Petition

81-1342

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COWETTA NEWS, INC., d/b/a
PLAYMATE VISUAL CENTER,

Petitioner

v.

CITY OF MEMPHIS,

Respondent

(Consolidated at trial and on appeal)

PETITION FOR WRIT OF CERTIORARI To The Court Of Appeals Of Tennessee

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QUESTIONS PRESENTED FOR REVIEW

1. When petitioner was in compliance with all other zoning, building and licensing provisions, may petitioner ignore the unconstitutional provision of a zoning ordinance requiring a special permit for adult entertainment and open for business without the required Certificate of Use and Occupancy?

2. May a municipality use the denial of a Certificate of Use and Occupancy permit under an unconstitutional zoning ordinance to prohibit petitioner from exercising its First Amendment rights to open an adult entertainment center?

3. When petitioner exercised its right of free expression by committing an allegedly illegal act of opening as an adult entertainment center and ignoring an unconstitutional provision of the zoning ordinance requiring a special permit for adult entertainment, may a municipality use the pretext of misrepresentation to deny petitioner's right of free expression when petitioner met all other lawful requirements?

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STATE OF TENNESSEE *Ex Rel. COWETTA NEWS, INC. d/b/a PLAYMATE VISUAL CENTER,*
Plaintiff-Appellee,

v.

CITY OF MEMPHIS,
Defendant-Appellant.

and

CITY OF MEMPHIS,
Plaintiff-Appellant,

v.

COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Defendant-Appellee.

(Consolidated at trial and on appeal)

PETITION FOR WRIT OF CERTIORARI To The Court Of Appeals Of Tennessee

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OPINIONS BELOW

The opinion of the Tennessee Court of Appeals, not yet reported, is printed as Appendix "A." The denial of the Application for Permission to Appeal by the Tennessee Supreme Court is not yet reported but is printed as Appendix "C."

JURISDICTION

The Supreme Court of Tennessee denied Petitioner's Application for Permission to Appeal on November 23, 1981. The Petition for a Writ of Certiorari is filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1—

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment 14, Section 1—

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Memphis City Code §28-106, Certificate of Occupancy—

(a) **Generally.** It shall be unlawful for an owner to use or permit the use of any building or premises or part thereof, hereafter created, changed, converted or enlarged, wholly or partly, until a certificate of occupancy, which shall be a part of the building permit, shall have been issued by the Commissioner of Public Service. Such certificate shall show that such building or premises or part thereof and the proposed use thereof are in conformity with the provisions of this Article. It shall be the duty

of the Commissioner of Public Service to issue a certificate of occupancy, provided he is satisfied that the building and the proposed use thereof conform with all the requirements herein set forth. No permit for excavation or construction shall be issued by the Commissioner before he is satisfied that the plans, specifications and intended use conform to the provisions of this Article.

Section 28-77, Adult Entertainment—

A shop or theater for the barter, rental, or sale of printed matter, pictures, motion picture film, or the viewing of motion pictures that is open to adults only and specifically excludes any minor by reason of age; and provided further that no building or occupancy permit shall be issued for such use until and unless the location of such use shall have been approved by the City Council after receiving a report by the Planning Commission in accordance with the procedures set forth in §28-102.

Section 28-102. Special use permits.

(A) The board of commissioners (City Council) may, by special permit and subject to such protective restrictions that are deemed necessary, authorize the construction, location, extension or structural alteration of any of the following buildings or uses, or an increase in their height, in any district from which these are prohibited or limited by this article:

* * *

(20) Adult entertainment shops and theatres may be authorized in the C-2, C-3 or C-4 Commercial Districts or in any industrial district subject to the following conditions:

(a) The building in which an adult shop or theatre is located shall be a minimum of two hundred (200) feet from any residential zoning district.

(b) A schedule stating the days and hours of operation shall be submitted for review and approval.

(c) Parking space shall be provided on the same premises as the shop or theatre on the ratio of not less than one (1) parking space for each one hundred (100) square feet of floor space within the main building, except for premises located within the "C-4" Central Business District.

* * *

(B) Before issuance of any special permit for any of the above buildings or uses, the following conditions shall be complied with:

(1) A public hearing in relation thereto shall be held before the planning commission, notice and publication of which hearing shall conform to the procedure prescribed in section 28-111 for hearings on changes and amendments.

(2) The planning commission shall study and report its recommendations to the board of commissioners regarding the effect of such proposed building or use upon the character of the neighborhood and upon traffic conditions, public utility facilities, and other matters pertaining to the public safety or general welfare. No action shall be taken upon any application for a proposed building or use above referred to until and unless the report and recommendations of the planning commission have been filed and reviewed by the board of commissioners, but such report shall be made within thirty (30) days after the date of the public hearing.

STATEMENT OF THE CASE

The Petitioner, Cowetta News, Inc., d/b/a Playmate Visual Center, obtained a City of Memphis business license on January 8, 1980. (Exhibit "A" Complaint). Cowetta applied for a building permit from the City of Memphis on January 15, 1980 to improve interior facilities in an existing building for Cowetta News Agency.

The Petitioner on February 12, 1980 purchased a mechanical business device permit from the Police Department of the City of Memphis to operate fifteen (15) *adult* movie machines. The fee of $375.00 was paid to the City of Memphis Collector of Licenses and Privileges (Exhibit "E" Complaint). After purchase of the mechanical amusement device permit to operate motion picture machines at the location, a building inspector advised the Petitioner that Petitioner could not open and that Petitioner needed a special permit for adult entertainment use. (Complaint Appendix I/Exhibit "F").

Petitioner, Cowetta News, Inc., *truthfully* advised the City of Memphis in February of 1980 that it would sell, exhibit and distribute what the City of Memphis contended was "adult entertainment." The City of Memphis Building Inspector issued the stop work order (Complaint Appendix I, Exhibit "F") that Petitioner needed a Special Permit for adult entertainment use. The City of Memphis in its Complaint stated that Petitioner in its sworn complaint had advised the Building Inspector it intended to open as a regular book store, but this was illegally denied. The City alleged that relying upon these representations it issued a Certificate of Occupancy on March 25, 1980 with the specific stipulation that the premises were not to be used for adult entertainment. The City never contended at any time that Petitioner's proposed location or its building violated any other zoning requirements or other provisions of the Code of Ordinance of the City of Memphis except those special permit requirements for an "adult entertainment" shop or theatre. If the

Petitioner had not told *the absolute truth* to the City of Memphis, the Building Inspector in February of 1980 would have not issued the stop work order. Even the City in its Complaint of May 9 stated "that subsequent to the issuance of the building permit to Cowetta News but prior to the issuance of the Certificate of Use and Occupancy, the City of Memphis through inspections made by its Building Department ascertained that the building was going to be utilized as an establishment for adult entertainment and for that reason refused to issue the defendant (Petitioner) a Certificate of Use and Occupancy without its obtaining a special use permit for adult entertainment." Petitioner then advised the building inspector that it would open as a regular bookstore and purchased inventory and merchandise which included magazines of all types. The Petitioner was advised by the City of Memphis building inspector that Petitioner still could not open even as a regular bookstore unless much of the remodeling and improvements previously done to the building were destroyed. (Complaint Appendix I)

Petitioner filed a complaint for mandamus, injunction and declaratory judgment. Petitioner prayed for a writ of mandamus requiring the City of Memphis to issue a use and occupancy certificate for the business as a bookstore. Petitioner also requested (1) an injunction that the City of Memphis had not enforced its use and occupancy certificates for adult bookstores uniformly and consistently and (2) for a declaratroy judgment that the provisions of the ordinance of the City of Memphis requiring a special permit were unconstitutional in violation of the First Amendment to the United States Constitution and a deprivation of property under the Fourteenth Amendment of the United States Constitution.

The ordinance was challenged in that (1) it had no specific standards for the granting of the special permit, (2) left to the complete discretion of the Council of the City of Memphis the restrictions that could be imposed, and (3) the definition of

adult entertainment was vague and indefinite in violation of the First Amendment.

Upon the filing of the lawsuit, Petitioner opened for business selling all types of magazines, both regular and adult, and in early March began displaying motion pictures.

On March 28, 1980, Petitioner filed an amendment to the complaint that the definition of adult entertainment was recognized as vague and indefinite by the City of Memphis and attached a staff report of the Planning Commission of Memphis and Shelby County recommending that "this broad definition" be amended. The amendment to the complaint alleged the ordinance should be declared unconstitutional and the Petitioner be allowed to operate as an adult bookstore without a special permit.

The Petitioner on March 28, 1980, upon the basis of its complaint and amended complaint, moved for a summary judgment or judgment on the pleadings to declare the definition of adult entertainment unconstitutional and that Petitioner was not required to obtain a special permit if Petitioner met other zoning requirements for the operation of a commercial enterprise at its location.

No action was taken by the City of Memphis from February 28, 1980, the date the lawsuit was filed and Plaintiff opened as a bookstore selling all types of magazines, both regular and adult, as well as began showing motion pictures pursuant to its permit in early March 1980 until the City of Memphis unilaterally mailed on March 25, 1980 a certificate of use and occupancy to the Petitioner. This certificate of use and occupancy had as a condition that adult entertainment as defined in §28-77 of the Memphis City Code was prohibited. The City of Memphis filed a Motion to Dismiss the Complaint on March 29, 1980.

The City of Memphis on May 9, 1980 filed a separate complaint for injunctive relief alleging that Cowetta News, Inc. was

operating the premises for adult entertainment in violation of the zoning ordinances of the City of Memphis requiring a special permit as well as in violation of Section 28-106 by using the premises beyond the limits set forth in the certificate of use and occupancy.

The City also averred the definition of adult entertainment had been amended. The Petitioner was alleged to be in violation of the amended ordinance and the City contended Petitioner must ask for a special permit under the amended language.

The City sought an injunction to prohibit Petitioner from utilizing its premises for adult entertainment without obtaining a special permit as required by the ordinances of the City of Memphis. The Petitioner filed an answer contending that the definition of adult entertainment was void in violation of the First and Fourteenth Amendments of the U.S. Constitution and that the granting of a special permit was by its terms in the total discretion of City officials without any objective standards and likewise unconstitutional under said same provisons.

The allegations of the City of Memphis that a special permit would be required under the City Ordinance should never have arisen since the City, by failing to appeal, now admits that provision of its ordinance was unconstitutional. The City of Memphis has never argued that Cowetta's original information was anything but totally truthful since the City knew from that inspection of the building that the premises were for adult entertainment and Petitioner otherwise complied with all zoning and building regulations. Upon the filing by Petitioner of its lawsuit, it opened its business without the benefit of a use and occupancy permit and contended that the definition of adult entertainment was unconstitutional. As stated in the argument to the Chancellor, Petitioner had a right to open and ignore this unconstitutional provision of the zoning law. Petitioner did not need to file a lawsuit challenging the constitutionality but could merely open in violation of the law and wait for any reaction by the City of Memphis.

The Chancery Court consolidated these two causes together with another injunctive action brought by the City against another newsstand entitled Watkins News Mart (no connection with Petitioner). The Chancery Court ruled the zoning provision relating to adult entertainment unconstitutional. The Chancery Court determined, however, there was a misrepresentation because the bookstore had *movie operating machines.* The court found the issuance by the City of the use and occupancy permit was a nullity and enjoined the Petitioner from operation. The final decree holding the ordinance unconstitutional but enjoining the operation of the Petitioner's business for misrepresenting to the City the intended use of the premises for motion pictures was entered on June 26, 1980. On that same date, Petitioner filed a Motion to Alter or Amend Judgment in which Petitioner alleged the trial court ignored a fundamental doctrine of constitutional law. In the pleading Petitioner stated:

> The United States Supreme Court has repeatedly stated that when a citizen is faced with an unconstitutional permit or licensing infringement upon his First Amendment rights he may disregard the unconstitutional regulation with impunity.

Petitioner cited *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 149, 89 S.Ct. 935. The Chancery Court allowed the Petitioner to continue operation and considered the motion in a hearing on July 2, 1980 wherein the court stated:

> The issue to come before this court at this time is not "constitutionality." The court has ruled on that. The issue is simply whether or not there was a full and adequate disclosure to the City by the other two parties in this series of actions about what they were going to do aside from "adult bookstores." The court agrees with the argument that, if they had been open and above board and complete, that the City's denial on the basis that it didn't meet the then City ordinance as an "adult bookstore" they had

> every right to ignore that. The court agrees with that argument.

The Chancery Court then went on to say that the City had a right to know the Petitioner was going to have a *movie theater* and the question was whether this made any difference or not. The Court recessed for the parties to take proof as to whether or not there was any reliance upon the City. The Chancery Court had a third hearing on September 11, 1980 and found that whether or not there were movies in addition to adult books made no difference to the City in the enforcement of the zoning ordinance. An amended final decree was entered that Petitioner may continue to use the premises under the use and occupancy certificate heretofore issued by the City.

There was *no appeal* by the City from the order finding §28-77 defining adult entertainment as *unconstitutional.*

The Court of Appeals disagreed with the Chancellor and held regardless of the unconstitutional definition of adult entertainment, the Petitioner obtained its use certificate by express and intentional misrepresentations. The Court of Appeals held that Petitioner's reliance upon the doctrine stated in *Shuttlesworth* v. *Birmingham, supra,* was misplaced in that there was no misrepresentation in the application for the parade permit. The Court of Appeals reinstated the original injunction of the trial court ordering the Petitioner's place of business closed even though the denial of the original use and occupancy certificate in early February by the building inspector prohibiting the use of the premises as an adult bookstore was based upon an unconstitutional ordinance. The Court of Appeals ignored this unconstitutional action.

Petitioner filed a petition for rehearing to the Court of Appeals alleging the court misapplied the fundamental constitutional principles of *Shuttlesworth* v. *Birmingham* and that the court's decision gave force to a provision of the zoning or-

dinance conceded by the City of Memphis to be unconstitutional. The Court of Appeals denied the petition to rehear on September 29, 1981.

Within the time provided by law, the Petitioner applied to the Supreme Court of Tennessee for permission to appeal again raising the federal question that the Court of Appeals incorrectly applied the constitutional doctrines and that Petitioner was entitled under the First and Fourteenth Amendments to open and ignore the unconstitutional ordinance. The Supreme Court of Tennessee on November 23, 1981 was of the opinion that the application to appeal should be denied, with concurrence in the result only.

REASONS FOR GRANTING THE WRIT

1. The Ruling Of The Tennessee Court Of Appeals Is Contrary To The Decisions Of This Court That A Person Faced With An Unconstitutional Licensing Law May Ignore It And Engage With Impunity In The Exercise Of The Right Of Free Expression For Which The Law Purports To Require A License.

In *Shuttlesworth* v. *City of Birmingham, Alabama,* 394 U.S. 147, 89 S.Ct. 935, the Court set forth the principle of constitutional law that the Court of Appeals of Tennessee misapplied. The Court stated as follows:

> And our decisions have made clear that a person faced with an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.
>
> 394 U.S. at 151.

Among the numerous cases cited in the footnote in support of this statement is *Lovell* v. *City of Griffin, Ga.,* 303 U.S. 444, 58 S.Ct. 666, in which the Court said:

> The struggle for the freedom of the press was primarily directed against the power of the licensor.
>
> 303 U.S. at 451.

The Court was reversing the conviction of Mr. Shuttlesworth for intentionally marching without a permit. In all the cases before the Court the individuals were knowingly disregarding or violating the law and were prepared to challenge any actions by governmental authorities charging them with violation of what they considered to be an unconstitutional law. In *Freedman* v. *Maryland,* 380 U.S. 51, 85 S.Ct. 734, Freedman as a test of the license scheme had exhibited a motion picture film without first submitted the motion picture to the Board of Censors. This

Court recently recognized the unconstitutionality of a zoning scheme as applied to nude dancing in *Schad* v. *Burough of Mt. Ephraim,* ____ U.S. ____, 101 S.Ct. 2176. Schad was found guilty in the municipal court for violation of the zoning ordinance. Justice White in delivering the opinion of the Court stated:

> But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.'
>
> 101 S.Ct. at 2182.

Justice Blackman in concurring stated:

> After today's decision, it should be clear that where protected First Amendment interests are at stake, zoning regulations have no such 'talismanic immunity from constitutional challenge.'
>
> 101 S.Ct. at 2187.

All of the challengers to licensing permit or zoning ordinances were engaged in illegal conduct.

The petitioner, Cowetta News, Inc., challenged a provision of the City of Memphis zoning ordinance as unconstitutional and alleged it did not meet the standards as approved by this Court in *Young* v. *American Mini-Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440. Cowetta News opened in violation of the zoning laws without a certificate of use and occupancy. It was guilty of an illegal act by not applying for and receiving a special permit under an admitted unconstitutional provision defining adult entertainment. There is no difference in any illegal or assumed misrepresentation by petitoner and the action of other litigants involved in cases before this Court. The petitioner could discontinue business and lose its entire investment or open for business and risk being charged with violations of the zoning ordinance.

The City of Memphis did not choose to file any criminal violations because Cowetta News was open and operating without a certificate of use and occupancy for any type of business in violation of the City Ordinance from the date of its lawsuit, February 28, 1980, until the City unilaterally issued a certificate with a condition against adult entertainment on March 25, 1980. The City is required by its own ordinance (28-106) to issue a certificate only if the Commissioner of Public Service is satisfied that the proposed use will conform to all requirements of the zoning ordinance which would require a final inspection.

After the City of Memphis in February, 1980, unconstitutionally refused petitioner a use and occupancy permit and even refused a permit for a regular bookstore unless petitioner destroyed some of the improvements previously made, Cowetta never again made application to the City of Memphis for a use and occupancy permit. Petitioner filed a lawsuit challenging the zoning provision as unconstitutional and also sought a Writ of Mandamus. Petitioner never requested the Court to hear the mandamus request but was content to remain open (whether as an adult or a regular bookstore) in violation of the ordinance by not having a certificate of use and occupancy. Cowetta when faced with an unconstitutional licensing or permit law was entitled to ignore it and open for business. The Court should not permit a collateral issue raised by the City's lawsuit filed some two and one-half months later to deny the Plaintiff's constitutional right to distribute material protected by the First Amendment. The City cannot use an unconstitutional licensing or permit provision as a means of denying the petitoner its First Amendment rights.

2. **The Ruling Of The Tennessee Court Of Appeals Is Contrary To Decisions Of Federal Courts Of Appeal Permitting A Person Faced With An Unconstitutional Licensing Or Permit Law To Ignore It And Exercise The Right Of Free Expression.**

Federal Courts of Appeal have uniformly held that licensing and permit schemes cannot be used by municipal corporations to deny the exercise of First Amendment rights of free expression. Such licensing and permit schemes have either been ignored or declaratory judgment actions brought challenging such schemes by persons such as petitioner. The federal Courts of Appeal have deermined that the exercise of First Amendment freedoms is subject to license requirements only where there are narrow, objective, and definite standards to guide the licensing authority. The license cannot operate as a prior restraint. A license may be required of motion picture theatres but the requirement of a license cannot violate First Amendment rights. For that reason, the United States Court of Appeals for the Seventh Circuit in *Genusa, et al.* v. *City of Peoria,* 619 F.2d 1203 (1980), held many provisions of a municipal licensing statute invalid as unconstitutional prior restraints on speech. The plaintiff filed a complaint attacking the constitutionality and the Court restrained enforcement of the ordinance so there was no need for the plaintiff to continue operation in violation of the unconstitutional provision. Likewise, in *Spokane Arcades, Inc.* v. *Brockett,* 631 F.2d 135 (1980), the Court enjoined the enforcement of the ordinance prior to its effective date. While the statute related to nuisances, the Court's holding prohibited the closure of a business as a prior restraint. The denial of a license or the revocation of a license or permit acts in the same way and is an impermissible prior restraint.

Only one of three corporations was held to have standing to challenge a Chicago ordinance licensing motion picture theatres and permitting revocation of such licensing by the Mayor. The Court determined that a theatre operating without a license risked arrest, prosecution and substantial fines. The Court determined that the municipal ordinance was unconstitutional on its face by subjecting the exercise of First Amendment freedoms to the prior restraint of the licensing requirement. *Grandlo Corporation, et al.* v. *Rochford,* 536 F.2d 197 (7th Cir. 1976). The

United States Court of Appeals for the Sixth Circuit in the recent decision of *Keego Harbor Company* v. *City of Keego Harbor, et al.*, 657 F.2d 94 (1981), found the ordinance of the city which effectively banned adult motion pictures abridged First Amendment rights. The Court found that the local community did not have carte blanche authority to regulate adult fare without concern for the First Amendment.

The decisions of the Federal Court of Appeals and particularly those decisions of state courts of last resort cite numerous decisions of federal district courts in which licenses and permit statutes were held invalid and could be disregarded and no further appeal was taken by the municipal authorities. Among those decisions cited are *Bayside Enterprises, Inc., et al.* v. *Carson,* 470 F.Supp. 1140 (M.D. Fla. 1979); *Avon 42nd Street Corporation* v. *Myerson,* 352 F.Supp. 994 (S.D. N.Y. 1972); and *Jodbor Cinema, Ltd.* v. *Setita,* 309 F.Supp. 868 (W.D. N.Y. 1970).

Bayside held portions of the Jacksonville, Florida licensing scheme unconstitutional and cited a great number of cases with the following language:

> There is no distinction of any significance to be drawn between an injunction that imposes a prior restraint on presumptively protected materials, as previously discussed, and a licensing system that accomplishes the same results through the initial denial of a license or the revocation of a license previously issued. In each case, a party is denied the right to disseminate presumably protected materials in the future because he has disseminated unprotected materials in the past. This court's research indicates that this obvious analogy has been drawn by virtually every court that has considered the matter.
>
> 470 F.Supp. at 1145.

The District Court, in holding the New York City licensing scheme was invalid, stated the First Amendment also protects "against the disabling of the vehicle by which the public is enabled to view the films." *See,* 352 F.Supp. at 999. Finally, in *Jodbor* the Court found the licensing revocation scheme invalid with the effect of the Mayor's license revocation more pervasive than the factual situation in *Freedman* and other cases of this Court. The license revocation required the theatre to face two practical alternatives of continuing business as usual with revoked licenses and risk being charged with criminal violations of the ordinance or discontinuing business and loss of its entire income. To require the theatre to face these alternatives constituted a violation of rights under the First and Fourteenth Amendments and the District Court said:

> The Supreme Court has said that the plaintiff, faced with an unconstitutional licensing law, was entitled to ignore it and continue in business.
>
> 309 F.Supp. at 878.

The petitioner in this cause from the time the building inspector gave the theatre the notice that it could not operate as an adult theatre in early February, 1980 without obtaining a special permit was entitled to ignore an unconstitutional law and continue in business. Assuming the petitioner in filing its lawsuit misled the City (which petitioner denies but will not argue), petitioner was doing nothing more than disobeying an unconstitutional statute. It could ignore the statute. By ignoring the statute and complying with all other provisions it was opening as a book store and theatre in compliance with the zoning code. Its action of challenging the constitutionality of the statute by declaratory judgment was an act of good faith notice to the City. The petitioner amended its lawsuit and filed for a Summary Judgment. Since the petitioner was operating, it sought no emergency relief from the Court. The City's unilateral action or strategy in issuing the permit raised a false issue of misrepresentation. The City waited to amend its ordinance before it filed

suit. It can be argued the City engaged in a strategy to try to raise a false issue so as to enforce its unconstitutional ordinance or operate against petitioner ex post facto.

Whether petitioner's illegal action was opening without a license or misleading the City that it was opening as a "regular" book store but selling or exhibiting "adult" books and motion pictures, the petitioner must be allowed to ignore the ordinance and open its business. Any other holding would allow municipalities to circumvent the Constitution.

3. The Ruling Of The Tennessee Court Of Appeals Is Contrary To Decisions Of The Highest Courts Of Other States Permitting A Person Faced With An Unconstitutional Permit Or License To Ignore It And Engage With Impunity In The Exercise Of A Right Of Free Expression.

The highest courts of other states recognize that the denial or revocation of a license to sell materials protected by the First Amendment is a prior restraint in violation of the First Amendment. *Alexander* v. *City of St. Paul,* 227 N.W.2d 370 (Minn. 1975); *City of Delavan* v. *Thomas,* 334 N.E.2d 190 (Ill. 1975); *Mayor and Alderman of the City of Savannah* v. *TWA, Inc.,* 314 S.E.2d 370 (Ga. 1975); and *People ex rel. Gow* v. *Mitchell Bros. Santa Ana Theatre,* 114 Calif.App.3d 923 (1981). The City of St. Paul attempted to rescind Alexander's license to operate a motion picture theatre based upon an ordinance permitting revocation because of a past conviction relating to obscenity. The Minnesota Supreme Court recognized that when the City licensed a motion picture theater, it is licensing an activity protected the First Amendment and the power of the City is more limited. The City's attempt to rescind the license was clearly a prior restraint of expression. 227 N.W.2d at 373. The Court further stated:

> The risk that criminal sanctions will be insufficient to deter future violations of the ordinance cannot justify the City's

attempt to revoke plaintiff's license in the face of his right to the free speech guaranty of the First Amendment.

227 N.W.2d at 373.

The Georgia Supreme Court in *Savannah, supra,* upheld the trial court's holding that the City improperly denied the license and stated:

> Let is be sufficient here to say that the city declined to issue the business licenses sought by the applicants because it was suspected that the applicants were going to sell pornographic materials, if they acquired the business licenses for which they had applied. Thus, the central and dispositive question in these cases in whether a municipal government may use the denial of a business license, coupled with threats to prosecute criminally for doing business without a license, as a means of suppressing suspected pornography without hearing any specific proof whatsoever of obscenity.
>
> ...
>
> The facts in these cases show that the applicants had complied with all the requirements necessary for obtaining business licenses to sell materials that are protected by the First Amendment. In such a situation a municipality must issue the license applied for and thereafter suppress the sale of pornographic material through proper proceedings that will not damage the doctrine of prior restraint. See *Sanders, supra,* p. 612.

214 S.E.2d at 372.

The attempt of the Court of Appeals to allow the City of Memphis to use word games and deny a certificate of use and occupancy because the petitioner chose to ignore an unconstitutional zoning permit should not be allowed to stand. Such a decision was undermine the court's protection of First Amendment rights in these and other cases.

4. The City Of Memphis May Not Use The Pretext Of Misrepresentation To Deny Petitioner Its Right To Ignore An Unconstitutional Provision Of A Zoning Ordinance And Exercise Its Right Of Free Expression.

Assume arguendo that petitioner misrepresented to the City of Memphis in its Complaint of February 28, 1980, that it would open as a "regular" bookstore and the City of Memphis issued a Certificate of Use and Occupancy to the petitioner on March 25, 1980. The City of Memphis thereafter on May 9, 1980, filed to enjoin the petitioner from violating the zoning ordinance by operating an adult entertainment shop or theater without special permit and to enjoin the petitioner from operating its premises beyond the conditions set forth in its Certificate of Use and Occupancy.

Petitioner asks the Court to further assume that petitioner opened for business on February 28, 1980, not only illegally in violation of the alleged unconstitutional zoning law but also as an adult entertainment shop or theater and the City of Memphis believed it was opening as a regular bookstore.

Regardless of any alleged misrepresentation by a lawsuit the petitioner opened illegally in February, 1980 *without a certificate of use and occupancy* and in violation of the zoning code. There is no difference between petitioner and Mr. Freedman of *Freedman* v. *Maryland, supra.* Mr. Freedman did not submit his motion picture film for a license. It was conceded that license would have been granted. He chose to ignore the ordinance and challenge it as unconstitutional. The petitioner complied with all other laws. A business license was purchased. A mechanical amusement license for adult motion picture films was purchased. A building permit was applied for and the petitioner met all building, safety and zoning laws except it did not apply for a special permit as an adult entertainment shop or theater under the zoning code. *Petitioner's action in opening was no different than the criminal action of any other party who*

would choose to ignore an unconstitutional licensing law. Petitioner had several alternatives: petitioner could stay closed; petitioner could ignore the zoning law and open as an adult entertainment center; or petitioner could file a lawsuit asking for relief that the zoning ordinance was unconstitutional as well as ask for relief to open as a regular bookstore. Petitioner by the lawsuit gave the City notice of its challenge to the law.

Petitioner chose to do both the second and third alternatives. Petitioner challenged the zoning ordinance relating to adult entertainment as unconstitutional. Petitioner also opened *without* any use and occupancy certificate. Petitioner could have asked for an immediate hearing by the court on the Writ of Mandamus or the declaratory judgment or both. Petitioner, however, chose to merely file the lawsuit and make no affirmative effort to seek an immediate hearing until the City filed its subsequent suit in May of 1980.

It is difficult for petitioner to believe a misrepresentation existed since the chancellor's concern was only that petitioner operated a motion picture theater in addition to a bookstore. The Tennessee Court of Appeals allowed the City to rely upon a statement in the Complaint concerning the writ of mandamus without looking at the additional allegations of the unconstitutionality of the zoning provision and the request for an injunction in the same Complaint. The Court of Appeals ignored any duty of the City to investigate under ordinance Section 28-106 before issuing the certificate in March. The City had previously investigated and denied the certificate based on the unconstitutional ordinance because petitioner had truthfully advised the City of its intention to operate as an adult entertainment shop or theater.

Regardless of any assumed misrepresentation, the petitioner has not done anything that others have not done in ignoring an unconstitutional ordinance and committing an illegal act. The City of Memphis is just as aware of the constitutional principle

as the petitioner that petitioner faced with an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license or permit.

The City of Memphis is attempting to play word games to circumvent the constitutional principle that petitioner may ignore an unconstitutional infringement on its First Amendment rights.

The City of Memphis and the Tennessee courts would be closing a business protected by the First Amendment because of the lack of a permit under an unconstitutional ordinance. The petitioner was entitled to open in early February, 1980, when the building inspector knew the petitioner intended to open as an adult entertainment shop or theater and denied it a certificate of use and occupancy based upon an unconstitutional ordinance. The City of Memphis knew through the sale by its Police Department and the Collector of Licenses and Privileges that petitioner had purchased all business licenses and a mechanical amusement license for adult motion pictures theaters. The Court cannot permit the use of an unconstitutional permit or licensing statute to deny First Amendment rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals of Tennessee. Petitioner requests that the Court consider an appropriate order as a summary disposition on the merits in accordance with Rule 23.1 reversing the Court of Appeals and ordering the issuance of the Certificate of Use and Occupancy.

Respectfully submitted,

JOHN C. SPEER
Twentieth Floor
First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

Shelby Equity [consolidated at trial
and on appeal]

Honorable D. J. Alissandratos,
Chancellor

State of Tennessee Ex Rel. Cowetta News, Inc.,
d.b.a. Playmate Visual Center,
Plaintiff-Appellee,
(No. 86667-3)

vs.

City of Memphis,
Defendant-Appellant.

[and]

City of Memphis,
Plaintiff-Appellant,
(No. 86944-3)

vs.

Cowetta News, Inc., d.b.a. Playmate Visual Center,
Defendant-Appellee.

[and]

City of Memphis,
Plaintiff-Appellant,
(No. 86945-1(3))

vs.

Watkins News Mart and Mike Ray,
Defendants-Appellees.

Clifford D. Pierce, Jr., City Attorney, E. Brady Bartusch, Deputy City Attorney for the city.

James T. Allison of Memphis for Watkins News Mart.

Stephen D. Wakefield of Memphis for Cowetta.

REVERSED, REMANDED

Opinion filed: September 8, 1981

MATHERNE, J.

These lawsuits, consolidated for trial and on appeal, involve the refusal of the city to honor Use and Occupancy Certificates issued by it to the defendants, thereby denying the defendants the right to operate their respective premises as places of adult entertainment. The chancellor held that certain misrepresentations were made to the city officials in the applications for the Use and Occupancy Certificates, but the city officials did not rely upon those misrepresentations to the detriment of the city. It was further held that the holders of the Use and Occupancy Certificates could continue to operate their businesses thereunder. The city appeals.

Cowetta News, Inc., d.b.a. Playmate Visual Center (Cowetta) obtained a building permit to renovate its premises at 1764 Winchester, Memphis, Tennessee. No mention was made that the premises would be used as an adult entertainment center. Upon learning that Cowetta planned to operate the premises as an adult entertainment center, the city refused to issue a Use and Occupancy Certificate without Cowetta first obtaining from the city council a Special Use Permit, which under section 28-102 of the city code is required before premises may be used for adult entertainment. Cowetta then filed a lawsuit, No. 86667-3, against the city seeking a writ of mandamus requiring the city to issue the Use and Occupancy Certificate for its business as a regular bookstore and also sought an adjudication that section 28-77 of the city code which defined adult entertain-

ment and section 28-102 were unconstitutional. Relying upon the representations made by Cowetta in its sworn complaint that it wanted a use certificate to operate as a regular bookstore, the city officials issued a Use and Occupancy Certificate to Cowetta with the express stipulation that the premises not be used for adult entertainment as defined in section 28-77 of the city code. About six weeks later the city ascertained that Cowetta was using the premises for adult entertainment and filed a lawsuit, No. 86944-3, to enjoin Cowetta from using the premises for adult entertainment without first obtaining from the city council a Special Use Permit as required by section 28-102 of the city code. The complaint further alleged the foregoing facts relative to the issuance of the Use and Occupancy Certificate in reliance upon Cowetta's sworn complaint that it would open a regular bookstore and also alleged the pending mandamus suit filed by Cowetta.

On the same day that the city sued Cowetta, it also filed a lawsuit, No. 86945-1(3), to enjoin Watkins News Mart and Mike Ray from operating a business at 1278 N. Watkins, Memphis, Tennessee, without first obtaining a Special Use Permit from the city council to operate the premises as an adult entertainment center. The gravamen of that lawsuit is that the defendants had previously obtained a building permit and a use certificate for the premises without mention of adult entertainment. Upon learning that the premises were to be used for adult entertainment, the city officials issued a stop-work order on the premises and explained to the defendant's attorney the necessity for a Special Use Permit from the city council. Thereafter, the defendant's attorney wrote the city's building inspector a letter which acknowledged that he understood the need for a Special Use Permit if the premises were to be used for adult entertainment and stated the following:

> In the meantime, however, my client wishes to open his business as a news mart and amusement arcade. He had paid all of the proper taxes and obtained the necessary

> licenses to do this. The range of material he will sell will be similar to the World News Mart, 124 Monroe, Memphis. The machines will be amusement machines.

Relying upon these representations, the city rescinded the stop-work order and allowed the construction to proceed and the business to open.

Before proceeding further, we deem it appropriate to point out that no testimony was offered in open court. The evidence consists of affidavits, depositions, and exhibits thereto. This evidence establishes that if the businesses conducted by the defendants constitute entertainment of any kind, it would most certainly have to fall under the term "adult entertainment" as used by the parties in this lawsuit. The city was, therefore, justified in suing to enjoin the operation of these businesses as not complying with those provisions of the city code setting out the requirements for that type business and Cowetta was justified in challenging the constitutionality of the code definition of adult entertainment. We further point out that on April 28, 1980, which was after the filing of lawsuit No. 86667-3 Cowetta against the city and before the city filed lawsuits No. 86944-3 and 86945-1(3) against Cowetta and News Mart, the city rewrote section 28-77 of the city code defining adult entertainment.

In the mandamus lawsuit by Cowetta against the city, Cowetta filed a motion for summary judgment, and the city filed a motion to dismiss. In the other two lawsuits by the city seeking to enjoin Cowetta and News Mart from operating adult entertainment centers, those two defendants answered claiming that (1) sections 28-77 and 28-102 of the city code are unconstitutional as violative of the First and Fourteenth Amendments to the federal constitution and article I, section 19, article XI, section 8 of the state constitution; (2) to apply the amended secton 28-77 of the city code would violate the constitutional prohibition of ex post facto laws as found at article I, section 11 of the state

constitution and the Fourteenth Amendment to the federal constitution; and (3) the city has not uniformily applied the requirent of a Special Use Permit for the operations of adult entertainment centers, and to apply those regulations to the defendants would violate the equal protection clause of the Fourteenth Amendment to the federal constitution.

After a hearing, the chancellor entered a Final Decree on June 26, 1980, wherein he held that: (1) the definition of adult entertainment as set forth in section 27-77 of the city code is unconstitutiona; (2) the Use and Occupancy Certificates issued to Cowetta and Watkins News Mart and Mike Ray are a nullity because those defendants misrepresented to the city the intended use of their premises and that there was a detrimental reliance by the city upon those misrepresentations; (3) Cowetta and Watkins News Mart and Mike Ray "are specially enjoined from utilization of the premises at their respective locations, i.e. 1764 Winchester, Memphis, Tennessee, and 1278 N. Watkins, Memphis, Tennessee, except for storage of materials presently located there or ordered prior to the issuance of this injunction, until they have made a proper application in compliance with current law and ordinances and have been issued a Use and Occupancy Certificate for the premises or until such time as they can show unreasonableness on the part of the city and that the city should be required by Mandamus to issue the certificates." There is no appeal from the order finding section 28-77 of the city code, as it existed prior to being rewritten, unconstitutional.

Thereafter, Cowetta filed a Motion to Alter or Amend Judgment on three principal grounds: (1) the court in its Final Decree gave full force and effect to an ordinance it declared to be unconstitutional; (2) the finding of detrimental reliance by the city upon a material misrepresentation by the defendant is not supported by the evidence; and (3) a citizen is not required to give obedience to an unconstitutional permit or licensing infringment upon his First Amendment rights, citing *Shuttlesworth* v. *City of Brimingham,* 394 U.S. 149 (1969).

After a hearing on the motion, the chancellor made a ruling that is a bit difficult to understand. As we interpret the ruling, the chancellor held that the city should present proof that through misrepresentation by the defendants it issued Use and Occupancy Certificates for the operation of "movies," "movie theaters," and "video theaters." The chancellor ruled that no consideration would be given the adult entertainment aspect of the matter because he had declared the statute defining adult entertainment to be unconstitutional. Proof was taken and the chancellor entered an Amended Final Decree on October 1, 1980, wherein he concluded that the city did not rely upon the misrepresentations to its detriment. The injunctions decreed in the June 26, 1980 judgment were dissolved, and the defendants were permitted to continue to operate their businesses under the Use and Occupancy Certificates issued by the city.

We disagree with the chancellor, and we do not treat so lightly the fact that the city issued the certificates based upon false representations intentionally made by the defendants.

Cowetta argues that but for the unconstitutional code section which defined adult entertainment, it was entitled to the certificate, and the city was legally obligated to issue it. We disagree with that argument becuase, regardless of the definition of adult entertainment or the lack thereof, Cowetta obtained its use certificate by express and intentional misrepresentations. These false statements were expressed in a sworn complaint Cowetta filed against the city. It was only because of the city's reliance upon those statements that it issued the certificate—there was reliance by the city to its detriment. Based upon these false representations, Cowetta obtained the certificates for which it sued. The certificate was not issued by the city based upon an interpretation of the unconstitutional code section which defined adult entertainment. Based upon Cowetta's sworn complaint, the issue of adult entertinament, whatever its definition, was not under consideration. Cowetta will not be

permitted to come into a court of equity and obtain the relief it seeks based upon false statements in its original sworn complaint.

The defendants Watkins News Mart and Mike Ray attempt to justify their acts by complaining of the manner in which the city enforces or fails to enforce the ordinance under consideration. There is no satisfactory proof that the city has been discriminatory in the issuance of its use certificate in cases of this nature. The issue is whether the defendants obtained permission to open their business by falsely representing certain facts to the city. By affidavit, Mike Ray (Michael Ray Turbeville) stated:

> I decided to plug in my movie machines and sell articles and materials sold by all the other adult entertainment centers in Memphis.

That statement points up the false nature of the representation he made to the city through his attorney, as heretofore noted. The city relied upon those misrepresentations and permitted the work to proceed and the business to open. The city did rely to its detriment on the misrepresentations made by this defendant.

The defendants' reliance upon *Shuttlesworth* v. *Birmingham, supra,* is misplaced. The City of Birmingham passed an ordinance that required a permit in order to parade along the streets of the city. On Good Friday 1963, 52 people, all Negroes, staged a march along the sidewalks of the city, led by three Negro ministers, one of whom was Shuttlesworth. They were arrested because they did not have a parade permit. One week before the march Shuttlesworth sent a representative to the City Hall to obtain a permit, and the official in charge summarily denied the request. Two days later Shuttlesworth requested a parade permit by telegram, and his request was summarily denied. The Supreme Court reversed the conviction of Shuttlesworth on constitutional grounds. In *Shuttlesworth* there was

no misrepresentation in the application for the parade permit, and the permit was wrongfully refused. Here, there were misrepresentations in the application for the use permits which resulted in the issuance of the permits. The constitutional issues raised in *Shuttlesworth* can not be here applied to relieve the defendants from the consequences of their own wrongs.

The Amended Final Decree entered in these consolidated cases on October 1, 1980, is reversed. The Final Decree entered on June 26, 1980, is reinstated, and the injunction therein set out is now enforceable, any orders of dissolution or stay of the injunctions are overruled. Court costs will be as assessed in a judgment of even date herewith. These causes are remanded to the trial court for the enforcement of its June 26, 1980 judgment.

MATHERNE, J.

TOMLIN, J. (Concurs)

McLEMORE, SPEC. J. (Concurs)

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

SHELBY EQUITY
(Consolidated at trial and on appeal)

State of Tennessee Ex Rel, Cowetta News, Inc.,
d/b/a Playmate Visual Center,
Plaintiff-Appellee,
(No. 86667-3)

v.

City of Memphis,
Defendant-Appellant.

(and)

City of Memphis,
Plaintiff-Appellant,
(No. 86944-3)

v.

Cowetta News, Inc., d/b/a Playmate Visual Center,
Defendant-Appellee.

(and)

City of Memphis,
Plaintiff-Appellant,
(No. 86945-1(3))

v.

Watkins News Mart and Mike Ray,
Defendants-Appellees.

OPINION ON PETITION TO REHEAR

A Petition for Rehearing has been filed on behalf of the defendant-appellee, Cowetta News, Inc., d/b/a Playmate Visual Center, seeking to have this Court rehear the case as to it. The appellees Watkins News Mart and Mike Ray are in no way involved in this Petition.

The issues raised by the appellee's Petition, although well and vigorously argued, have been considered by the Court and found to be without merit. Accordingly, the Petition is overruled at the cost of petitioner.

PER CURIAM

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

SHELBY EQUITY

State of Tennessee ex rel. Cowetta News, Inc., etc.,
Appellant,

vs.

City of Memphis,
Appellee.

ORDER

Upon consideration of the application for permission to appeal and the answer thereto, the briefs of counsel and the entire record, the Court is of the opinion that the application should be denied, with concurrence in the result only.

PER CURIAM

APPENDIX D

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 86667-3

State of Tennessee, On The Relation of Cowetta News, Inc., d/b/a Playmate Visual Center,
Plaintiffs,

vs.

City of Memphis,
Defendant.

No. 86944-3

City of Memphis,
Plaintiff,

vs.

Cowetta News, Inc., d/b/a Playmate Visual Center,
Defendants.

No. 86945-1(3)

City of Memphis,
Plaintiff,

vs.

Watkins News Mart and Mike Ray,
Defendants.

Hearing Date June 26, 1980

FINDINGS OF THE COURT:

* * *

The only issue before this Court as to "constitutionality" is with regard to the old ordinance. All the facts arise under that old ordinance.'

* * *

The Court in this case finds that, indeed, this ordinance is deficient, the "old ordinance" for lack of a better term, the ordinance under which the facts arose under which everyone was relying. It is deficient because of that lack of reasonableness on behalf of the Council, to have made that finding and to be able to justify what is was doing when it encroached on that First Amendment right. It has to show, for example, how far is far enough away and why it is that far. Then, it has to define specifically, so that there is no vagueness, based on a "reasonable man" test, not based on the particular sensabilities of the litigant, whether or not under a "reasonable man" test, there is a certainty so that a person could make the determination as to whether that followed the ordinance or not. For that reason, the Court does rule in favor of the Defendants as to the lack of constitutionality. However, and it is separate and apart, there is an equitable principle. The Use and Occupancy Certificate, according to the city's complaint in paragraph five, and according to their proof, the City of Memphis, relying on the representation made by the Defendant, and I am speaking of the Defendant Cowetta News Agency, "Issued the aforesaid Certificate of Use and Occupancy on March 25, 1980 for the premises to be used as 'Cowetta News Agency', with the specific stipulation and condition that the premises was not to be used for adult entertainment as defined in secton 2877." The Defendant, Cowetta, in its lawsuit that it filed, in its original complaint, on page 3, it says: "Wherefore, Complainant prays that a Writ of Mandamus be issued requiring the City of Memphis to

issue him a Use and Occupancy Certificate for his business as a book store." Clearly, therefore, there was no meeting of the minds. There was clearly a misrepresentation, that what they were seeking was to open up a book store, and while a book store deals with books, I have yet to see a book store that has movie operating machines. Whether or not that is significant insofar as the city is concerned, I don't know, but insofar as both of these Defendants is concerned, since it also affects the other Defendant, their misrepresentation, the issue is, as a matter of equity, was there a detrimental reliance based on a material representation for the issuance of the Use and Occupancy Certificate? The Court finds that there was. Therefore, the Court finds that the issuance by the city was a nullity.

* * *

APPENDIX E

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY DIVISION AT MEMPHIS

No. 86667-3

State of Tennessee on the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center,
Plaintiff,

vs.

City of Memphis,
Defendant.

No. 86944-3

City of Memphis,
Plaintiff,

vs.

Cowetta News, Inc., d/b/a Playmate Visual Center,
Defendant.

No. 86945-1[3]

City of Memphis,
Plaintiff,

vs.

Watkins News Mart and Mike Ray,
Defendants.

FINAL DECREE

These causes came on to be heard together, pursuant to a Consent Order of Consolidation, upon the sworn Complaint for Mandamus Injunction and Declaratory Judgment and Amendment thereto together with a Motion for Summary Judgment filed by Cowetta News, Inc., d/b/a Playmate Visual Center and the response of the Defendant, City of Memphis, in cause #86667-3; upon the sworn Complaint for Injunctive Relief filed by the Plaintiff, City of Memphis, and the Answer thereto filed by the Defendant, Cowetta News, Inc., d/b/a Playmate Visual Center in cause #86944-3; upon the sworn Complaint for Injunctive Relief filed by the Plaintiff, City of Memphis, and the Answer thereto filed by the Defendants, Watkins News Mart and Mike Ray in cause #86945-1[3]; upon evidence introduced by the parties hereto; upon submission of memoranda and argument by solicitors for the parties, and upon the entire record in the causes;

From all of which it appears to the Court and the Court finds that the definition of adult entertainment as set forth in Section 28-77 of the Code of Ordinances of the City of Memphis, before its amendment on April 29, 1980, is unconstitutional, for the reasons set forth in the opinions filed herein which is incorporated herein by reference as if fully set forth.

It further appears to the Court and the Court finds that as set forth in the opinion filed and incorporated herein by reference that the Use and Occupancy Certificates heretofore issued to the Defendants by the City are a nullity as the Defendants, Cowetta News, Inc., d/b/a Playmate Visual Center and Wakins News Mart and Mike Ray misrepresented to the City the intended use of their premises and that there was a detrimental reliance on these material misrepresentations by the City, and that the Defendants, Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray should be enjoined from operating any kind of business at their respective loca-

tions, i.e., 1764 Winchester and 1278 North Watkins until they have made a proper application for and the City has issued a Use and Occupancy Certificate or until such time as these Defendants show that the City is acting unreasonably and that a Writ of Mandamus should issue ordering the City to issue the Use and Occupancy Certificate.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the definition of adult entertainment as set forth in Section 28-77 of the Code of Ordinances of the City of Memphis, before its amendment on April 29, 1980, is unconstitutional for the reasons set forth in the opinion filed in these causes which is incorporated by reference herein as if fully set forth;

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the Use and Occupancy Certificates heretofore issued to the Defendant, Cowetta News, Inc., d/b/a Playmate Visual Center for its premises at 1764 Winchester, Memphis, Tennessee, and to the Defendants, Watkins News Mart and Mike Ray for its premises at 1278 North Watkins, Memphis, Tennessee, are a nullity as the aforesaid Defendants misrepresented to the City the intended use of their premises and that there was a detrimental reliance on these material misrepresentations by the City, as set forth in the opinion filed in these causes which is incorporated by reference herein as if fully set forth;

IT IS, FURTHER, ORDERED, ADJUDGED AND DECREED that the Defendants, Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray are specifically enjoined from utilization of the premises at their respective locations, i.e., 1764 Winchester, Memphis, Tennessee, and 1278 North Watkins, Memphis, Tennessee, except for storage of material presently located there or ordered prior to the issuance of this injunction, until they have made a proper

application in compliance with current laws and orindances and have been issed a Use and Occupancy Certificate for the premises or until such time as they can show unreasonableness on the part of the City and that the City should be required by Mandamus to issue the certificate;

The costs of these causes are to be assessed equally against the parties.

The exception by the Defendant, Cowetta News, Inc., d/b/a Playmate Visual Center and the Defendnats, Watkins News Mart and Mike Ray, to the Court's action in granting equitable relief to the Plaintiff, City of Memphis, is noted.

D.J. Alissaudralos
CHANCELLOR
DATED: 6/26/80

APPENDIX F

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 86667-3

State of Tennessee, On the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center,
Plaintiffs,

vs.

City of Memphis,
Defendant.

No. 86944-3

City of Memphis,
Plaintiff,

vs.

Cowetta News, Inc. d/b/a Playmate Visual Center,
Defendants.

No. 86945-1(3)

City of Memphis,
Plaintiff,

vs.

Watkins News Mart and Mike Ray,
Defendants.

Hearing Date: July 2, 1980

FINDINGS OF FACT

* * *

The issue to come before this Court at this time is not "constitutionality." The Court has ruled on that. The issue is simply whether or not there was a full and adequate disclosure to the City by the other two parties in this series of actions about what they were going to do aside from "Adult Book Stores." The Court agrees with the argument that, if they had been open and above heard and complete, that the City's denial on the basis that it didn't meet the then City ordinance as an "Adult Book Store", they had every right to ignore that. The Court agrees with that argument.

* * *

The word "Adult" is not of significance. What concerned the Court and still concerns the Court is that that representation of having movie theators, a video theater, movies, that lack of representation to the City is, I believe, material, and the City, in the case of Watkins News Mart receives a letter that sets out specifically what it is that the news mart is going to do. The news mart can indeed go ahead and do the adult books if they want to, since I have held that to be unconstitutional. They could have back then, but they didn't say "We're going to have movies. We're going to have a movie theater." The Court finds that that is something that the City has a right to know. The question is, does this make any difference or not? And, this Court doesn't know at this point if it is going to make a difference, because the city didn't have the benefit of being told that, so they could go out there and view the premises with that standard in mind, for move theaters, treating this business no better and no worse than any other business. The question is: "All right. Is that a material misrepresentation?" The Court finds toward that end that it would be a burden on the City to show that, taken back to the time when all of this started, that if they had been told, aside from the "Adult Book Store" con-

cept, "Adult" aside, if they had been told that these places were going to be operating move theaters, video theaters, would they stil have had to have issued the Use and Occupancy Certificate? Would it have met all of their criteria? The Court agrees with the Defendants' argument that at this point, the Court can not say that it would or would not. Therefore, I will allow additional proof to be taken with that standard in mind. The City will have to carry that burden of proof, subject to a rigorous cross-examination and rigorous discovery by the Defendants and otherwise, to find out whether or not that would have made a difference. If it would have made a difference, then it is indeed a material misrepresentation that the City relied, to its legal detriment, on and they are indeed entitled to have that action, the issue of the Use and Occupancy Certificate rescinded, and whatever has transpired since then, it is now of no concern to the City in terms of the legislative action by the Council. The Court would find itself in the position of having to put the parties, as of the date of the entering of that Final Decree, back into the same position that they were in before all of this had transpired, but under current and existing laws. If the City fails to carry that burden of proof, if indeed the proof is that, aside from the Adult Theater or Adult Book Store rather, a video theater or a movie theater, they would still have had to issue a Use and Occupancy Certificate, then, indeed, the Defendants are correct, that since the Court did find that the ordinance was unconstitutional, and if at that point, the Court did not find that there was a material representation upon which the City relied to its legal detriment, then, indeed, then the Defendants would be in a position to be entitled to a Use and Occupancy Certificate under those laws at that time, with an unconstitutional law, and no other ordinance having been passed. That is the critical, pivotal point.

* * *

APPENDIX G

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 86667-3

State of Tennessee, On the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center,
Plaintiffs,

vs.

City of Memphis,

No. 86944-3

City of Memphis,
Plaintiff,

vs.

Cowetta News, Inc., d/b/a Playmate Visual Center,
Defendant.

No. 86945-1(3)

City of Memphis,
Plaintiff,

vs.

Watkins News Mart and Mike Ray,
Defendants.

Hearing Date: September 11, 1980

FINDINGS OF THE COURT

THE COURT: Thank you, gentlemen. I thank all of you for the efficiency with which you have swiftly brought the matter before this Corut for a final determination. The Court in its first opinion prematurely had found that there was a material misrepresentation. The Court did not prematurely find that there was a misrepresentation, and the entire purpose, as I at length went into in the second opinion, for the necessity of further proof and for this hearing was to determine whether or not there was a material misrepresentation.

* * *

The equitable maxim that was quoted, the Court has reflected on many times, and the last portion of it is: "Mislead another to its injury." Again, the same, consistent principle. There has to be an "injury." Just to mislead is not enough. Based on the deposition, it is very clear to this Court that the City's Officer in Charge of issuing these permits would have done nothing different had he been told the truth, that there was nothing in the ordinances that would have required him to do anything differently. There was nothing that would have required something different from the companies.

Therefore, the Court does not find that there was a material misrepresentation, because the Corut doesn't find that there was any detrimental reliance, and does not find that the City relied on these misleading misrepresentations to its injury. The question finally boils down to "So what? What would theCity have done differently?" The answer that I glean from that deposition is "Nothing." They just don't like being lied to, and nobody does.

The Court would point out that, while this may be a disadvantage from a pleasantry point of view of the course of conduct of the City with other persons, it is not a shackle on the City

in the case of a person who makes a material misrepresentation, but that is a burden that is on the City. If, for example, the true owner of this place, by law would be estopped from running such an establishment, as we have in the case of liquor establishments, you can't operate one if you are a convicted felon, then, that would be a material misrepresentation, but there is nothing here in this record that shows that there was any material misrepresentation.

Therefore, the Court abhors persons who tell falsehoods, as a matter of law, and even as a matter of equity, the Court finds no basis upon which the relief sought by the City can be granted, and therefore, a Final Decree should be entered in favor of these companies.

* * *

APPENDIX H

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY DIVISION AT MEMPHIS

No. 86667-3

State of Tennessee on the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center,
Plaintiff,

vs.

City of Memphis,
Defendant.

No. 96944-3

City of Memphis,
Plaintiff,

vs.

Cowetta News, Inc., d/b/a Playmate Visual Center,
Defendant.

No. 86945-1[3]

City of Memphis,
Plaintiff,

vs.

Watkins News Mart and Mike Ray,
Defendants.

AMENDED FINAL DECREE

These causes came on to be heard on July 2, 1980, upon the Motion of Cowetta News, Inc. to Alter or Amend Judgment and to Stay the Effect of Injunction until Final Determination of Motion to Alter or Amend Judgment, upon argument by solicitors for the parties and upon the entire record in the causes;

From all of which it appeared to the Court as set forth in the opinion rendered on July 2, 1980, and filed herein on September 11, 1980, said opinion incorporated herein by reference as if fully set forth, that although there were misrepresentations made to the City by Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray, the City would have to carry the burden of proof that the misrepresentations were material representations upon which the City relied to its legal detriment and the Court granted the City additional time to provide additional proof concerning the aforesaid issue;

That subsequent to the opinion rendered on July 2, 1980, additional proof was submitted by the parties hereto and the cause came on to be heard on September 11, 1980, at which time the Court ruled in favor of Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray for the reasons set forth in the opinion of September 11, 1980, filed September 30, 1980, said opinion incorporated herein by reference as if fully set forth;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Final Decree heretofore entered be and is hereby amended for the reasons set out in the opinions incorporated herein by reference, to reflect that Cowetta News, Inc., d/b/a Palymate Visual Center and Watkins News Mart and Mike Ray may continue to use their premises under the Use and Occupancy Certificate heretofore issued by the City.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that costs of the causes are to be divided equally among the parties.

The exception by the City of Memphis to the Court's action is noted and the City is hereby granted an appeal to the Court of Appeals as provided by law.

D. J. ALISSANDRALOS
CHANCELOR

DATED: 10-1-80

APPENDIX I

IN THE CHANCERY COURT OF TENNESSEE FOR THE TENTH CHANCERY DIVISION AT MEMPHIS

No. 86667-3

State of Tennessee on the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center,
Plaintiff,

vs.

City of Memphis,
Defendant.

COMPLAINT FOR MANDAMUS, INJUNCTION AND DECLARATORY JUDGMENT

Comes now the Plaintiff and for its cause of action would respectfully show to the Court that:

* * *

5. The Plaintiff completed remodeling and improvements on the building, and on February 12, 1980, purchased from the City of memphis mechanical amusement devises permits as shown by the permit approved and fees collected in Exhibit "E", together with a copy of the receipt which is shown on Exhibit "A".

6. The Plaintiff was thereafter confronted by an inspector of the building department of the City of Memphis who issued to it a notice that a use and occupancy certificate was required and that a special permit was needed as shown by Exhibit "F".

7. The Plaintiff thereafter in considering whether to apply for a special permit, or to otherwise engage in other business, advised the building inspector of the City of Memphis that the Plaintiff

intended to open as a regular bookstore and pursuant to this desire, Plaintiff made arrangements to open as a regular bookstore. As a necessary part of this desire, Plaintiff expended large sums purchasing inventory and merchandise.

8. The Plaintiff, however, was illegally denied by the City of Memphis the right to open its business as a regular bookstore, unless much of the remodeling and improvements previously done to the building were destroyed. This denial was, and is, in clear violation of the ordinances of the City of Memphis.

9. The Plaintiff has the right to open as a bookstore and to determine when, and if, it shall apply for a special permit to engage in other activities. It need not tear down facilities within its building but can chose to operate as a regular bookstore and make the determination at a later date as to whether or not to apply for a special permit. In addition, to apply for a special permit it takes various exhibits, engineering drawings and other matters, and Plaintiff desires to open his business immediately to avoid excessive business losses.

WHEREFORE, Complainant prays that a Writ of Mandamus be issued requiring the City of Memphis to issue him a use in occupancy certificate for his business as a bookstore.

* * *

EXHIBIT F

CITY OF MEMPHIS, TENN.

Bureau Of Construction Code Enforcement
125 North Main Room 404 Phone: 528-2560

PRIOR TO OCCUPANCY OF ANY VACANT COMMERCIAL BUILDING OR TENANT SPACE, A "USE AND OCCUPANCY" CERTIFICATE IS REQUIRED TO BE OBTAINED FROM THE BUILDING OFFICIAL (CITY OF MEMPHIS ORDINANCE VOLUME I, SECTION 28-106 AND ORDINANCE VOLUME II, SECTION 47-1, SECTION 120).

THIS IS NOT TO BE MISCONSTRUED AS A CONDEMNATION OR DANGEROUS BUILDING NOTE.

LOCATION 1742 Winchester
SUITE NO.

BY Ed White

Remarks Need Special Permit for Adult Entertainment use.

For: F. M. BOSAK
BUILDING OFFICIAL

APPENDIX J

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY DIVISION AT MEMPHIS

No. 86944-3

City of Memphis,
Plaintiff,

vs.

Cowetta News, Inc., d/b/a Playmate Visual Center,
Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

TO: THE CHANCELLORS OF THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

Comes now the Plaintiff, City of Memphis, and for its cause of action would respectfully show the Court that:

1. Plaintiff is a municipal corporation under the laws of the State of Tennessee and located in Shelby County and that the Defendant is a Tennessee Corporation with offices in Shelby County, Tennessee, doing business as Playmate Visual Center at 1764 Winchester, Memphis, Tennessee.

2. The City of Memphis on March 25, 1980, issued a Certificate of Use and Occupancy to the Defendant for the premises at 1764 Winchester, Memphis, Tennessee, to be used as Cowetta News Agency; that included within the special stipulations and conditions of the aforesaid Certificate of Use and Occupancy was the provision that adult entertainment as defined in Section 28-77 of the Memphis and Shelby County Zoning Ordinance was not a permitted use at this location, said Certificate of Use

and Occupancy attached hereto as Exhibit 1 of this Complaint for Injunctive Relief. That there was in full force and effect at the time of the issuance of the Certificate of Use and Occupancy Section 28-77 of the Code of Ordinances of the City of Memphis which contains the following definition:

> "Adult Entertainment:
>
> A shop or theatre for the barter, rental, or sale of printed matter, pictures, motion picture film, or the viewing of motion pictures that is open to adults only and specifically excludes any minor by reason of age; and provided further that no building or occupancy permit shall be issued for such use until and unless the location of such use shall have been approved by the City Council after receiving a report by the Planning Commission in accordance with the procedure set forth in Section 28-102.
>
> * * *

3. That subsequent to the issuance of the bulding permit to Cowetta News Agency but prior to the issuance of the aforesaid Certificate of Use and Occupancy, the City of Memphis through inspections made by its Building Department ascertained that the building was going to be utilized as an establishment for adult entertainment and for that reason refused to issue the Defendant a Certificate of Use and Occupancy without its obtaining a special use permit for adult entertainment.

4. That as a result of the City's refusal to issue a Certificate of Use and Occupancy as above set forth, the Defendant on February 29, 1980, in this Court filed a Complaint for Mandamus Injunction and Declaratory Judgment in the case styled *State of Tennessee On The Relation of Cowetta News, Inc., d/b/a Playmate Visual Center, Plaintiff,* v. *City of Memphis, Defendant, No. 86667-3,* wherein the Complaint sought a Writ of Mandamus requiring the City of Memphis to issue it a Use and Occupancy Certificate for its business as a bookstore and

additionally sought a declaration of the Court that Sections 28-77 and 28-102 of the Code of Ordinances of the City of Memphis, were unconstitutional. In the sworn Complaint, the Defendant herein alleged that it had advised the Building Inspector of the City of Memphis that the Defendant herein intended to open as a regular bookstore and pursuant to this desire had made arrangements to open as a regular bookstore but that the Defendant herein was illegally denied by the City of Memphis the right to open its business as a regular bookstore.

5. The City of Memphis, relying on the representations made by the Defendant, issued the aforesaid Certificate of Use and Occupancy on March 25, 1980, for the premises to be used as Cowetta News Agency with the specific stipulation and condition that the premises was not to be used for adult entertainment as defined in Section 28-77.

* * *

8. That the Defendant by its action in utilizing its premises for adult entertainment is in violation of the aforesaid ordinances concerning adult entertainment and special use permits (Sections 28-77 and 28-102) as well as Section 28-106 of the Code of Ordinances of the City of Memphis which limits the use of property to that which is described in the Certificate of Use and Occupancy, said Section hereto attached as Exhibit 4, and that the City of Memphis will sustain irreparable injury if it fails to enforce its ordinances and require the Defendant to comply with its laws.

PREMISES CONSIDERED, COMPLAINANT PRAYS THAT:

1. Defendant be required to answer this Complaint within the time required by law.

2. Upon the filing of this Complaint and notice to the Defendant a Temporary Injunction issue restraining the Defendant, its agents, servants and employees from violating the Certificate

of Use and Occupancy heretofore issued and from utilizing its premises at 1764 Winchester, Memphis, Tennessee, for adult entertainment as defined in Section 28-77 of the Code of Ordinances of the City of Memphis without obtaining a special use permit as required by Section 28-102 of the Code of Ordinances of the City of Memphis.

3. At the final hearing in this matter, a permanent injunction issue against the Defendant restraining it, its servants, its agents and employees from violating the Certificate of Use and Occupancy heretofore issued and from utilizing its premises at 1764 Winchester, Memphis, Tennessee, for adult entertainment as defined in Section 28-77 of the Code of Ordinances of the City of Memphis without obtaining a special use permit as required by Section 28-102 of the Code of Ordinance of the City of Memphis.

4. Plaintiff have such other further and additional relief as it may be entitled to under the pleadings and the facts.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1342

In the Supreme Court of the United States

October Term, 1981

COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Petitioner,

vs.

CITY OF MEMPHIS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLIFFORD D. PIERCE, JR.
City Attorney
E. BRADY BARTUSCH
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314 - 125 N. Mid-America Mall
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(901) 528-2614
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

The petitioner failed to include within the purview of its Questions Presented for Review the fact that the courts of the State of Tennessee have found that petitioner obtained its Certificate of Use and Occupancy by express and intentional misrepresentations to the respondent and that these false statements were expressed in a sworn complaint filed against the respondent in a Court of Equity.

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No. 81-1342

In the Supreme Court of the United States

October Term, 1981

COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Petitioner,

vs.

CITY OF MEMPHIS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On February 29, 1980, Petitioner, herein referred to as Cowetta filed in Chancery Court a Complaint for Mandamus, Injunction and Declaratory Judgment in the case styled *State of Tennessee on the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center, Plaintiff v. City of Memphis, Defendant, #86667-3,* wherein Cowetta sought a Writ of Mandamus requiring the Respondent (hereinafter referred to as the City) to issue it a Use and Occupancy Certificate for its business as a bookstore and additionally sought a declaration of the Court that Sections 28-77 and 28-102 of the Code of Ordinances of the City of Memphis were unconstitutional. Section 28-77 of the Code

defined adult entertainment and Section 28-102 required a Special Use Permit for premises where adult entertainment was to be offered. (R. 2-14)

Prior to the filing of the mandamus action Cowetta News Agency on January 15, 1980, had applied for and obtained a building permit from the City for alterations to the premises for Cowetta News Agency with no mention of adult entertainment. (R. 11, 178) Subsequent to the issuance of the building permit, the City through inspection made by its Building Department, ascertained that the building was going to be utilized as an establishment for adult entertainment and for that reason refused to issue Cowetta News Agency a Certificate of Use and Occupancy without its obtaining a Special Use Permit for adult entertainment. (R. 44-45, 178-183) That as a result of the City's refusal to issue a Certificate of Use and Occupancy, Cowetta filed its Complaint for Mandamus referred to above. In the sworn Complaint, Cowetta alleged that it had advised the Building Inspector of the City of Memphis that Cowetta intended to open as a regular bookstore but that the City was illegally denying it the right to open its business as a regular bookstore. (R. 2, 3) The City, relying on the representations made by Cowetta, issued a Certificate of Use and Occupancy on March 25, 1980, with the specific stipulation and condition that the premises not be used for adult entertainment as defined in Section 28-77. (R. 44-47, 184, 231, 232)

On May 9, 1980, the City having ascertained that Cowetta was in fact operating its premises for adult entertainment without obtaining a Special Use Permit, filed its Complaint for Injunctive Relief with supporting Affidavits in the case styled *City of Memphis, Plaintiff v. Cowetta News, Inc., d/b/a Playmate Visual Center, Defendant, #86944-3.* (R. 25, Appendix I) In that cause, the City

asked the Court to enjoin Cowetta from violating the Certificate of Use and Occupancy heretofore granted to it for its premises at 1764 Winchester and to further enjoin Cowetta from providing adult entertainment as defined in Section 28-77 of the Code of Ordinances without first obtaining a Special Use Permit as required by Section 28-102 of the Code. The Complaint alleges that which has been previously set forth, i.e. the issuance of a building permit to Cowetta News Agency, the ascertainment by the City that the premises were actually being remodeled for adult entertainment, the refusal to issue a Certificate of Use and Occupancy until a Special Use Permit was acquired, the filing of the mandamus action by Cowetta and the issuance of a Use and Occupancy Certificate based on Cowetta's representations that the premises would be utilized as a regular bookstore. (R. 25)

In *State of Tennessee on the Relation of Cowetta News, Inc., d/b/a Playmate Visual Center, Plaintiff v. City of Memphis, Defendant, #86667-3,* the City filed a Motion to Dismiss and another Motion to Strike as well as a response to the Motion for Summary Judgment. (R. 22, 24) In *City of Memphis, Plaintiff v. Cowetta News, Inc., d/b/a Playmate Visual Center, Defendant, #86944-3,* Cowetta filed an answer which primarily alleged that the adult entertainment and the special use permit ordinances were unconstitutional. (R. 62, 96) The Chancellor entered an Order of Consolidation and the matters together with Watkins News Mart (not involved in this petition) were heard together on the record without testimony from the stand. (R. 114)

On June 26, 1980, the Chancellor entered a Final Decree (R. 124) wherein the Court for the reasons set forth in the opinion of the same date (R. 248, Appendix E) found that the definition of adult entertainment as set

forth in Section 28-77 of the Code of Ordinances of the City of Memphis prior to its amendment on April 28, 1980, was unconstitutional. The Court further held that the Use and Occupancy Certificate issued to Cowetta News was a nullity as they had misrepresented to the City the intended use of their premises and that there was a detrimental reliance on these material misrepresentations.

The Court further enjoined Cowetta from utilization of their premises except for storage of material presently located there or ordered prior to the issuance of the injunction until they had made proper application in compliance with current laws and ordinances and have been issued a Use and Occupancy Certificate for the premises or until such time as they could show unreasonableness on the part of the City and that the City should be required by mandamus to issue the Certificate.

Also on June 26, 1980, Cowetta filed a Motion to Alter or Amend the Judgment and a Motion to Stay Effect of the Injunction. (R. 120) The Court heard arguments on the Motions on July 2, 1980, and rendered an opinion therein which was filed on September 11, 1980 (R. 280, Appendix F), wherein the Court set aside the Final Decree heretofore entered and directed the City to produce additional proof as to whether or not the City would have issued the Use and Occupancy Certificate with the Adult Book Store aside. Pursuant to the Court's direction, the deposition of Frank Bosak, the City Building Official, was taken and a final hearing was held on September 11, 1980, wherein the Court, in its opinion which was filed on September 20, 1980 (R. 290, Appendix G), held that there were misleading misrepresentations but that there was no material misrepresentation because there was no detrimental reliance and that the City did not rely on the misleading misrepresentations to its injury.

An Amended Final Decree was entered on October 1, 1980, incorporating the opinions by reference, wherein the Court permitted the continued utilization of the premises under the Use and Occupancy Certificate heretofore issued by the City. (Appendix H) The City appealed the action of the Trial Court and the Court of Appeals reversed the Chancellor's Amended Final Decree and reinstated the Chancellor's Final Decree of June 26, 1980, and the injunctive provisions thereof. (Appendix B) The Court of Appeals denied Cowetta's Petition to rehear (Appendix C) and the State Supreme Court denied Cowetta's Application for permission to appeal with concurrence in the result only. (Appendix A)

STATEMENT OF FACTS

I.

On January 15, 1980, Cowetta News Agency made application for and was granted a building permit for interior partitions in an existing building for Cowetta News Agency and exterior alterations for their premises on Winchester. (R. 2, 44-46, 178)

II.

Subsequent to the issuance of the building permit, City Building Inspectors ascertained that the premises were being remodeled for adult entertainment and the Building Official refused to issue a Use and Occupancy Certificate until a Special Use Permit was acquired and Cowetta News was so advised on February 12, 1980. (R. 14, 44, 45, 178-183)

III.

On February 29, 1980, Cowetta News, Inc., d/b/a Playmate Visual Center filed a sworn Complaint for Mandamus

Injunction and Declaratory Judgment with various permits and receipts attached wherein it alleged that the premises were to be used as a *regular bookstore* and pursuant to this desire had made arrangements to open as a regular bookstore but that it was illegally denied by the City the right to open its business as a regular bookstore. (R. 3, 4)

IV.

Commensurate with the filing of the lawsuit, the Building Official of the City of Memphis (Frank Bosak) received a letter from Cowetta's attorney which in the second paragraph contained the following:

> "The Plaintiff in the aforementioned action has as of this date begun operation as a bookstore. . . .
>
> The business presently being operated at 1742 Winchester is that of a regular bookstore and it is inconceivable that it could be construed as an adult bookstore." (R. 183)

V.

Based on the representations made by Cowetta, the Building Official issued the Use and Occupancy Certificate to Cowetta News Agency to be used as Cowetta News Agency with the stipulation and condition that Adult Entertainment as defined in Section 28-77 of the Memphis and Shelby County Zoning Ordinance is not a permitted use at this location. (R. 44, 45, 184, 231, 232)

VI.

Cowetta as indicated in the Affidavit of Walter Nesbit had as a substantial or significant portion of its stock in trade books and magazines and other periodicals which

depict human genitals in a state of sexual stimulation or arousal, sexual intercourse, fondling of human genitals, pubic region, buttock and female breasts. (R. 39A, 39B)

VII.

In addition to the magazines, Cowetta News also provided movies for a specified price which depicted specific sexual activities such as sexual intercourse between individuals, masturbation and anatomical areas of individuals such as human genitals, pubic region and buttock described in Walter Nesbit's Affidavit as well as offering for sale and displaying sexual devices and sexual stimulants. (R. 39A, 39B)

VIII.

Cowetta News Agency, Inc. had from the beginning intended to conduct the type of business described in Walter Nesbit's Affidavit as indicated by the statement of its president filed in this cause as follows:

> "Following the filing of February 29, 1980, of the above-referenced action, the present Defendant, Cowetta News Agency, Inc. began to conduct business as it had originally intended to do. Because of the nature and content of some of the materials available, the decision was made to open the business to 'adult' patrons only. Admittance to the business premises of the Defendant had always been limited to those individuals 18 years of age or older." (R. 52)

IX.

Frank Bosak is the City Building Official and is responsible for the administration and the enforcement of the Building, Construction and Zoning Ordinances of

the City of Memphis which deal with health, safety and welfare. (R. 259)

X.

Section 28-106(a) of the Code of Ordinances of the City of Memphis which was in full force and effect at the outset of this controversy was as follows:

> "Generally. It shall be unlawful for an owner to use or permit the use of any building or premises or part thereof, hereafter created, changed, converted or enlarged, wholly or partly, until a certificate of occupancy, which shall be a part of the building permit, shall have been issued by the commissioner of public service. Such certificate shall show that such building or premises or part thereof and the proposed use thereof are in conformity with the provisions of this article. It shall be the duty of the commissioner of public service to issue a certificate of occupancy, provided he is satisfied that the building and the proposed use thereof conform with all the requirements herein set forth. No permit for excavation or construction shall be issued by the commissioner before he is satisfied that the plans, specifications and intended use conform to the provisions of this article." (R. 260, 261)

XI.

Frank Bosak, the City Building Official, testified that the information supplied by any applicant serves as the basis for measuring the health and safety requirements of that building and the use and occupancy requirements of that building and that unless his department has accurate information they cannot discharge their responsibilities for the protection of the health, safety and welfare of the

public. Frank Bosak further testified that factual misrepresentations are a detriment to the entire system because his department must have accurate information upon which to base its judgments. (R. 260, 261)

XII.

Frank Bosak, the City Building Official, testified that putting aside the concept of adult because of the Chancellor's opinion that he would have issued a Certificate of Use and Occupancy for the premises but that this misrepresentation of the proposed use of the property has a tendency to or does cast doubt upon his department's ability to accurately measure this job as far as the required health and safety measurements and any time there is misrepresentation it's a watering down of the system. (R. 266, 267)

ARGUMENT FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This case does not involve a constitutional question but rather whether petitioner will be permitted to enjoy the benefits of a Use and Occupancy Certificate obtained upon false representation intentionally made by it upon which the City relied to its detriment. This case involves the sanctity of sworn pleadings in a Court of Equity.

None of the cases cited by petitioner have any bearing on the issues herein as they do not involve express and intentional misrepresentations and sworn pleadings containing false statements.

The opinion of the Tennessee Court of Appeals is responsive to all of the Petitioner's argument particularly at page A8 (Appendix B) as follows:

"We disagree with the chancellor, and we do not treat so lightly the fact that the city issued the certificates based upon false representations intentionally made by the defendant.

Cowetta argues that but for the unconstitutional code section which defined adult entertainment, it was entitled to the certificate, and the city was legally obligated to issue it. We disagree with that argument because, regardless of the definition of adult entertainment or the lack thereof, Cowetta obtained its use certificate by express and intentional misrepresentations. These false statements were expressed in a sworn complaint Cowetta filed against the city. It was only because of the city's reliance upon those statements that it issued the certificate—there was reliance by the city to its detriment. Based upon these false representations, Cowetta obtained the certificates for which it sued. The certificate was not issued by the city based upon an interpretation of the unconstitutional code section which defined adult entertainment. Based upon Cowetta's sworn complaint, the issue of adult entertainment, whatever its definition, was not under consideration. Cowetta will not be permitted to come into a court of equity and obtain the relief it seeks based upon false statements in its original sworn complaint."

At page A9 of its opinion, the Court of Appeals stated:

"The defendants' reliance upon *Shuttlesworth v. Birmingham, supra,* is misplaced. The City of Birmingham passed an ordinance that required a permit in order to parade along the streets of the city. On Good Friday 1963, 52 people, all Negroes, staged a march along the sidewalks of the city, led by three Negro

ministers, one of whom was Shuttlesworth. They were arrested because they did not have a parade permit. One week before the march Shuttlesworth requested a parade permit by telegram, and his request was summarily denied. The Supreme Court reversed the conviction of Shuttlesworth on constitutional grounds. In *Shuttlesworth* there was no misrepresentation in the application for the parade permit, and the permit was wrongfully refused. Here, there were misrepresentations in the application for the use permits which resulted in the issuance of the permits. The constitutional issues raised in *Shuttlesworth* can not be here applied to relieve the defendants from the consequences of their own wrongs."

As previously indicated the Court of Appeals denied Cowetta's petition to rehear and the State Supreme Court denied its application for permission to appeal with concurrence in the result only.

In the case of *George Christians v. Town of East Ridge*, 12 Tenn. App. 101 (1928) the Appellate Court discussed the conscience aspect of equity jurisprudence and after quoting from two earlier Tennessee decisions made this statement at page 115:

"These two cases from our own courts furnish a chart for the guidance of enlightened conscience and are supported upon a foundation of what can and should be regarded as a sound public policy of promoting honesty and fair dealing and of discouraging subterfuge and trickery."

It is submitted that the actions of the Tennessee Appellate Courts herein reflect "sound public policy of promoting honesty and fair dealing and of discouraging subterfuge and trickery".

CONCLUSION

Respondent respectfully submits that on the basis of the foregoing, the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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E. BRADY BARTUSCH
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Attorneys for Respondent

APPENDIX

APPENDIX A

(Filed November 23, 1981)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

SHELBY EQUITY

STATE OF TENNESSEE ex rel. COWETTA NEWS, INC., etc.,
Appellant,

vs.

CITY OF MEMPHIS,
Appellee.

ORDER

Upon consideration of the application for permission to appeal and the answer thereto, the briefs of counsel and the entire record, the Court is of the opinion that the application should be denied, with concurrence in the result only.

PER CURIAM

APPENDIX B

IN THE
COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

Shelby Equity [consolidated at trial and on appeal]

STATE OF TENNESSEE EX REL. COWETTA NEWS, INC., d.b.a. PLAYMATE VISUAL CENTER,
PLAINTIFF-APPELLEE,
(No. 86667-3)

vs.

CITY OF MEMPHIS,
DEFENDANT-APPELLANT.

[AND]

CITY OF MEMPHIS,
PLAINTIFF-APPELLANT,
(No. 86944-3)

vs.

COWETTA NEWS, INC., d.b.a. PLAYMATE VISUAL CENTER,
DEFENDANT-APPELLEE.

[AND]

CITY OF MEMPHIS,
PLAINTIFF-APPELLANT,
(No. 86945-1(3))

vs.

WATKINS NEWS MART and MIKE RAY,
DEFENDANTS-APPELLEES.

Honorable D. J. Alissandratos, Chancellor

Clifford D. Pierce, Jr., City Attorney, E. Brady Bartusch, Deputy City Attorney for the city.

James T. Allison of Memphis for Watkins News Mart.

Stephen D. Wakefield of Memphis for Cowetta.

REVERSED, REMANDED

Opinion filed: SEP 8 1981

MATHERNE, J.

These lawsuits, consolidated for trial and on appeal, involve the refusal of the city to honor Use and Occupancy Certificates issued by it to the defendants, thereby denying the defendants the right to operate their respective premises as places of adult entertainment. The chancellor held that certain misrepresentations were made to the city officials in the applications for the Use and Occupancy Certificates, but the city officials did not rely upon those misrepresentations to the detriment of the city. It was further held that the holders of the Use and Occupancy Certificates could continue to operate their businesses thereunder. The city appeals.

Cowetta News, Inc., d.b.a. Playmate Visual Center (Cowetta) obtained a building permit to renovate its premises at 1764 Winchester, Memphis, Tennessee. No mention was made that the premises would be used as an adult entertainment center. Upon learning that Cowetta planned to operate the premises as an adult entertainment center, the city refused to issue a Use and Occupancy Certificate without Cowetta first obtaining from the city council a Special Use Permit, which under section 28-102 of the city code is required before premises may be used for adult entertainment. Cowetta then filed a lawsuit, No. 86667-3, against the city seeking a writ of mandamus requiring the city to issue the Use and Occu-

pancy Certificate for its business as a regular bookstore and also sought an adjudication that section 28-77 of the city code which defined adult entertainment and section 28-102 were unconstitutional. Relying upon the representations made by Cowetta in its sworn complaint that it wanted a use certificate to operate as a regular bookstore, the city officials issued a Use and Occupancy Certificate to Cowetta with the express stipulation that the premises not be used for adult entertainment as defined in section 28-77 of the city code. About six weeks later the city ascertained that Cowetta was using the premises for adult entertainment and filed a lawsuit, No. 86944-3, to enjoin Cowetta from using the premises for adult entertainment without first obtaining from the city council a Special Use Permit as required by section 28-102 of the city code. The complaint further alleged the foregoing facts relative to the issuance of the Use and Occupancy Certificate in reliance upon Cowetta's sworn complaint that it would open a regular bookstore and also alleged the pending mandamus suit filed by Cowetta.

On the same day that the city sued Cowetta, it also filed a lawsuit, No. 86945-1(3), to enjoin Watkins News Mart and Mike Ray from operating a business at 1278 N. Watkins, Memphis, Tennessee, without first obtaining a Special Use Permit from the city council to operate the premises as an adult entertainment center. The gravamen of that lawsuit is that the defendants had previously obtained a building permit and a use certificate for the premises without mention of adult entertainment. Upon learning that the premises were to be used for adult entertainment, the city officials issued a stop-work order on the premises and explained to the defendant's attorney the necessity for a Special Use Permit from the city council. Thereafter, the defendant's attorney wrote the

city's building inspector a letter which acknowledged that he understood the need for a Special Use Permit if the premises were to be used for adult entertainment and stated the following:

> In the meantime, however, my client wishes to open his business as a news mart and amusement arcade. He had paid all of the proper taxes and obtained the necessary licenses to do this. The range of material he will sell will be similar to the World News Mart, 124 Monroe, Memphis. The machines will be amusement machines.

Relying upon these representations, the city rescinded the stop-work order and allowed the construction to proceed and the business to open.

Before proceeding further, we deem it appropriate to point out that no testimony was offered in open court. The evidence consists of affidavits, depositions, and exhibits thereto. This evidence establishes that if the businesses conducted by the defendants constitute entertainment of any kind, it would most certainly have to fall under the term "adult entertainment" as used by the parties in this lawsuit. The city was, therefore, justified in suing to enjoin the operation of these businesses as not complying with those provisions of the city code setting out the requirements for that type business, and Cowetta was justified in challenging the constitutionality of the code definition of adult entertainment. We further point out that on April 28, 1980, which was after the filing of lawsuit No. 86667-3 Cowetta against the city and before the city filed lawsuits No. 86944-3 and 86945-1(3) against Cowetta and News Mart, the city rewrote section 28-77 of the city code defining adult entertainment.

In the mandamus lawsuit by Cowetta against the city, Cowetta filed a motion for summary judgment, and the city filed a motion to dismiss. In the other two lawsuits by the city seeking to enjoin Cowetta and News Mart from operating adult entertainment centers, those two defendants answered claiming that (1) sections 28-77 and 28-102 of the city code are unconstitutional as violative of the First and Fourteenth Amendments to the federal constitution and article I, section 19, article XI, section 8 of the state constitution; (2) to apply the amended section 28-77 of the city code would violate the constitutional prohibition of ex post facto laws as found at article I, section 11 of the state constitution and the Fourteenth Amendment to the federal constitution; and (3) the city has not uniformly applied the requirement of a Special Use Permit for the operations of adult entertainment centers, and to apply those regulations to the defendants would violate the equal protection clause of the Fourteenth Amendment to the federal constitution.

After a hearing, the chancellor entered a Final Decree on June 26, 1980, wherein he held that: (1) the definition of adult entertainment as set forth in section 27-77 of the city code is unconstitutional; (2) the Use and Occupancy Certificates issued to Cowetta and Watkins News Mart and Mike Ray are a nullity because those defendants misrepresented to the city the intended use of their premises and that there was a detrimental reliance by the city upon those misrepresentations; (3) Cowetta and Watkins News Mart and Mike Ray "are specially enjoined from utilization of the premises at their respective locations, i.e. 1764 Winchester, Memphis, Tennessee, and 1278 N. Watkins, Memphis, Tennessee, except for storage of materials presently located there or ordered prior to the issuance of this injunction, until they have made a proper

application in compliance with current law and ordinances and have been issued a Use and Occupancy Certificate for the premises or until such time as they can show unreasonableness on the part of the city and that the city should be required by Mandamus to issue the certificates." There is no appeal from the order finding section 28-77 of the city code, as it existed prior to being rewritten, unconstitutional.

Thereafter, Cowetta filed a Motion to Alter or Amend Judgment on three principal grounds: (1) the court in its Final Decree gave full force and effect to an ordinance it declared to be unconstitutional; (2) the finding of detrimental reliance by the city upon a material misrepresentation by the defendant is not supported by the evidence; and (3) a citizen is not required to give obedience to an unconstitutional permit or licensing infringment upon his First Amendment rights, citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 149 (1969).

After a hearing on the motion, the chancellor made a ruling that is a bit difficult to understand. As we interpret the ruling, the chancellor held that the city should present proof that through misrepresentation by the defendants it issued Use and Occupancy Certificates for the operation of "movies," "movie theaters," and "video theaters." The chancellor ruled that no consideration would be given the adult entertainment aspect of the matter because he had declared the statute defining adult entertainment to be unconstitutional. Proof was taken and the chancellor entered an Amended Final Decree on October 1, 1980, wherein he concluded that the city did not rely upon the misrepresentations to its detriment. The injunctions decreed in the June 26, 1980 judgment were dissolved, and the defendants were permitted to

continue to operate their businesses under the Use and Occupancy Certificates issued by the city.

We disagree with the chancellor, and we do not treat so lightly the fact that the city issued the certificates based upon false representations intentionally made by the defendants.

Cowetta argues that but for the unconstitutional code section which defined adult entertainment, it was entitled to the certificate, and the city was legally obligated to issue it. We disagree with that argument because, regardless of the definition of adult entertainment or the lack thereof, Cowetta obtained its use certificate by express and intentional misrepresentations. These false statements were expressed in a sworn complaint Cowetta filed against the city. It was only because of the city's reliance upon those statements that it issued the certificate—there was reliance by the city to its detriment. Based upon these false representations, Cowetta obtained the certificates for which it sued. The certificate was not issued by the city based upon an interpretation of the unconstitutional code section which defined adult entertainment. Based upon Cowetta's sworn complaint, the issue of adult entertainment, whatever its definition, was not under consideration. Cowetta will not be permitted to come into a court of equity and obtain the relief it seeks based upon false statements in its original sworn complaint.

The defendants Watkins News Mart and Mike Ray attempt to justify their acts by complaining of the manner in which the city enforces or fails to enforce the ordinance under consideration. There is no satisfactory proof that the city has been discriminatory in the issuance of its use certificate in cases of this nature. The issue is whether the defendants obtained permission to open their business by

falsely representing certain facts to the city. By affidavit, Mike Ray (Michael Ray Turbeville) stated:

> I decided to plug in my movie machines and sell articles and materials sold by all the other adult entertainment centers in Memphis.

That statement points up the false nature of the representation he made to the city through his attorney, as heretofore noted. The city relied upon those misrepresentations and permitted the work to proceed and the business to open. The city did rely to its detriment on the misrepresentations made by this defendant.

The defendants' reliance upon *Shuttlesworth v. Birmingham, supra,* is misplaced. The City of Birmingham passed an ordinance that required a permit in order to parade along the streets of the city. On Good Friday 1963, 52 people, all Negroes, staged a march along the sidewalks of the city, led by three Negro ministers, one of whom was Shuttlesworth. They were arrested because they did not have a parade permit. One week before the march Shuttlesworth sent a representative to the City Hall to obtain a permit, and the official in charge summarily denied the request. Two days later Shuttlesworth requested a parade permit by telegram, and his request was summarily denied. The Supreme Court reversed the conviction of Shuttlesworth on constitutional grounds. In *Shuttlesworth* there was no misrepresentation in the application for the parade permit, and the permit was wrongfully refused. Here, there were misrepresentations in the application for the use permits which resulted in the issuance of the permits. The constitutional issues raised in *Shuttlesworth* can not be here applied to relieve the defendants from the consequences of their own wrongs.

The Amended Final Decree entered in these consolidated cases on October 1, 1980, is reversed. The Final

Decree entered on June 26, 1980, is reinstated, and the injunction therein set out is now enforceable, any orders of dissolution or stay of the injunctions are overruled. Court costs will be assessed in a judgment of even date herewith. These causes are remanded to the trial court for the enforcement of its June 26, 1980 judgment.

/s/ Matherne
Matherne, J.

TOMLIN, J. (Concurs)
McLEMORE, SPEC. J. (Concurs)

APPENDIX C

(Filed September 29, 1981)

IN THE
COURT OF APPEALS OF TENNESSEE
WESTERN SECTION
AT JACKSON

SHELBY EQUITY (Consolidated at trial and on appeal)

STATE OF TENNESSEE EX REL. COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Plaintiff-Appellee,
(No. 86667-3)

v.

CITY OF MEMPHIS,
Defendant-Appellant.

(AND)

CITY OF MEMPHIS,
Plaintiff-Appellant,
(No. 86944-3)

v.

COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Defendant-Appellee.

(AND)

CITY OF MEMPHIS,
Plaintiff-Appellant,
(No. 86945-1(3))

v.

WATKINS NEWS MART and MIKE RAY,
Defendants-Appellees.

OPINION ON PETITION TO REHEAR

A Petition for Rehearing has been filed on behalf of the defendant-appellee, Cowetta News, Inc., d/b/a Playmate Visual Center, seeking to have this Court rehear the case as to it. The appellees Watkins News Mart and Mike Ray are in no way involved in this Petition.

The issues raised by the appellee's Petition, although well and vigorously argued, have been considered by the Court and found to be without merit. Accordingly, the Petition is overruled at the cost of petitioner.

PER CURIAM

APPENDIX D

IN THE
CHANCERY COURT OF SHELBY COUNTY,
TENNESSEE

NO. 86667-3

STATE OF TENNESSEE, ON THE RELATION OF
COWETTA NEWS, INC., D/B/A PLAYMATE
VISUAL CENTER
PLAINTIFFS

vs.

CITY OF MEMPHIS
DEFFENDANT

NO. 86944-3

CITY OF MEMPHIS
PLAINTIFF

vs.

COWETTA NEWS, INC., D/B/A PLAYMATE VISUAL
CENTER
DEFENDANTS

NO. 86945-1(3)

CITY OF MEMPHIS
PLAINTIFF

vs.

WATKINS NEWS MART AND MIKE RAY
DEFENDANTS

ORDER ON OPINION ENTERED JUNE 26, 1980

* * *

The Court in this case finds that, indeed, this ordinance is deficient, the "old ordinance" for lack of a better

term, the ordinance under which the facts arose under which everyone was relying. It is deficient because of that lack of reasonableness on behalf of the Council, to have made that finding and to be able to justify what it was doing when it encroached on that First Amendment right. It has to show, for example, how far is far enough away and why it is that far. Then, it has to define specifically, so that there is no vagueness, based on a "reasonable man" test, not based on the particular sensibilities of the litigant, whether or not under a "reasonable man" test, there is a certainty so that a person could make the determination as to whether that followed the ordinance or not. For that reason, the Court does rule in favor of the Defendants as to the lack of constitutionality. However, and it is separate and apart, there is an equitable principle. The Use and Occupancy Certificate, according to the city's complaint in paragraph five, and according to their proof, the City of Memphis, relying on the representation made by the Defendant, and I am speaking of the Defendant Cowetta News Agency, "Issued the aforesaid Certificate of Use and Occupancy on March 25, 1980 for the premises to be used as 'Cowetta News Agency', with the specific stipulation and condition that the premises was not to be used for adult entertainment as defined in section 2877." The Defendant, Cowetta, in its lawsuit that it filed, in its original complaint, on page 3, it says: "Wherefore, Complainant prays that a Writ of Mandamus be issued requiring the City of Memphis to issue him a Use and Occupancy Certificate for his business as a book store." Clearly, therefore, there was no meeting of the minds. There was clearly a misrepresentation, that what they were seeking was to open up a book store, and while a book store deals with books, I have yet to see a book store that has movie operating machines. Whether or not that is significant insofar as the city is concerned, I don't know, but

insofar as both of these Defendants is concerned, since it also affects the other Defendant, their misrepresentation, the issue is, as a matter of equity, was there a detrimental reliance based on a material representation for the issuance of the Use and Occupancy Certificate? The Court finds that there was. Therefore, the Court finds that the issuance by the city was a nullity. The Defendants may reapply under whatever existing standards, there are, whether they be legal or illegal, because at this point, the Court does not know, since it does not have the issue of the new ordinance before it; may reapply for a Use and Occupancy Certificate. The city is specifically prohibited from treating them any different than anybody else as far as dragging their feet on it. The outcome may or may not be the same, but the city must be given the opportunity to review a truthful and complete application. If they then unreasonably deny the applicant, that is a separate cause of action which the Court encourages the Defendants to bring. In the meantime however, without the Use and Occupancy Certificate, the Defendants are specifically enjoined from operating any kind of business at these locations, until they have a proper application and issuance of the Use and Occupancy Certificate or until such time as they show that unreasonableness is being had on behalf of the city, and the city should be mandamused to issue it.

* * *

APPENDIX E

IN THE
CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY
DIVISION AT MEMPHIS

NO. 86667-3

STATE OF TENNESSEE on the Relation of COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Plaintiff,

vs.

CITY OF MEMPHIS,
Defendant.

NO. 86944-3

CITY OF MEMPHIS,
Plaintiff,

vs.

COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Defendant.

NO. 86945-1[3]

CITY OF MEMPHIS,
Plaintiff,

vs.

WATKINS NEWS MART and MIKE RAY,
Defendants.

FINAL DECREE

These causes came on to be heard together, pursuant to a Consent Order of Consolidation, upon the sworn Complaint for Mandamus Injunction and Declaratory Judg-

ment and Amendment thereto together with a Motion for Summary Judgment filed by Cowetta News, Inc., d/b/a Playmate Visual Center and the response of the Defendant, City of Memphis, in cause #86667-3; upon the sworn Complaint for Injunctive Relief filed by the Plaintiff, City of Memphis, and the Answer thereto filed by the Defendant, Cowetta News, Inc., d/b/a Playmate Visual Center in cause #86944-3; upon the sworn Complaint for Injunctive Relief filed by the Plaintiff, City of Memphis, and the Answer thereto filed by the Defendants, Watkins News Mart and Mike Ray in cause #86945-1[3]; upon evidence introduced by the parties hereto; upon submission of memoranda and argument by solicitors for the parties, and upon the entire record in the causes;

From all of which it appears to the Court and the Court finds that the definition of adult entertainment as set forth in Section 28-77 of the Code of Ordinances of the City of Memphis, before its amendment on April 29, 1980, is unconstitutional, for the reasons set forth in the opinion filed herein which is incorporated herein by reference as if fully set forth.

It further appears to the Court and the Court finds that as set forth in the opinion filed and incorporated herein by reference that the Use and Occupancy Certificates heretofore issued to the Defendants by the City are a nullity as the Defendants, Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray misrepresented to the City the intended use of their premises and that there was a detrimental reliance on these material misrepresentations by the City, and that the Defendants, Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray should be enjoined from operating any kind of business at their respective locations, i.e., 1764 Winchester and 1278 North

Watkins until they have made a proper application for and the City has issued a Use and Occupancy Certificate or until such time as these Defendants show that the City is acting unreasonably and that a Writ of Mandamus should issue ordering the City to issue the Use and Occupancy Certificate.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the definition of adult entertainment as set forth in Section 28-77 of the Code of Ordinances of the City of Memphis, before its amendment on April 29, 1980, is unconstitutional for the reasons set forth in the opinion filed in these causes which is incorporated by reference herein as if fully set forth;

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the Use and Occupancy Certificates heretofore issued to the Defendant, Cowetta News, Inc., d/b/a Playmate Visual Center for its premises at 1764 Winchester, Memphis, Tennessee, and to the Defendants, Watkins News Mart and Mike Ray for its premises at 1278 North Watkins, Memphis, Tennessee, are a nullity as the aforesaid Defendants misrepresented to the City the intended use of their premises and that there was a detrimental reliance on these material misrepresentations by the City, as set forth in the opinion filed in these causes which is incorporated by reference herein as if fully set forth;

IT IS, FURTHER, ORDERED, ADJUDGED AND DECREED that the Defendants, Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray are specifically enjoined from utilization of the premises at their respective locations, i.e., 1764 Winchester, Memphis, Tennessee, and 1278 North Watkins, Memphis, Tennessee, except for storage of material pres-

ently located there or ordered prior to the issuance of this injunction, until they have made a proper application in compliance with current laws and ordinances and have been issued a Use and Occupancy Certificate for the premises or until such time as they can show unreasonableness on the part of the City and that the City should be required by Mandamus to issue the certificate;

The costs of these causes are to be assessed equally against the parties.

The exception by the Defendant, Cowetta News, Inc., d/b/a Playmate Visual Center and the Defendants, Watkins News Mart and Mike Ray, to the Court's action in granting equitable relief to the Plaintiff, City of Memphis, is noted.

/s/ D. J. Alissandratos
Chancellor
Dated: 6/26/80

APPROVED FOR ENTRY:

E. Brady Bartusch
Solicitor for Plaintiff,
City of Memphis

James T. Allison
Solicitor for Defendants,
Watkins News Mart and
Mike Ray

Stephen D. Wakefield and
Michael F. Pleasants
Solicitors for Defendant,
Cowetta News, Inc., d/b/a
Playmate Visual Center

APPENDIX F

IN THE
CHANCERY COURT OF SHELBY COUNTY,
TENNESSEE

NO. 86667-3

STATE OF TENNESSEE, ON THE RELATION OF
COWETTA NEWS, INC., D/B/A PLAYMATE
VISUAL CENTER
PLAINTIFFS

vs.

CITY OF MEMPHIS
DEFENDANT

NO. 86944-3

CITY OF MEMPHIS
PLAINTIFF

vs.

COWETTA NEWS, INC. D/B/A PLAYMATE
VISUAL CENTER
DEFENDANTS

NO. 86945-1 (3)

CITY OF MEMPHIS
PLAINTIFF

vs.

WATKINS NEWS MART AND MIKE RAY
DEFENDANTS

Opinion Rendered July 2, and filed on September 11, 1980

FINDINGS OF FACT

THE COURT: Gentlemen, with respect to the first aspect of the Defendants' argument, that they weren't

seeking equitable relief, the Court would point out that not only did they come into Chancery Court, which is a Court of Equity, versus going to a full law Court, which they had every right to do, but that furthermore, in their pleadings, they request "such other further and special relief as it may entitled to under the premises." The Court can only conclude under those circumstances that, certainly, they came into a Court of Equity with such a pleading to seek not only any specific relief, but also, based on such a general prayer, any other relief that the Court might deem appropriate, up to and including certainly equitable relief. And, in fact, they prayed for a Writ of Mandamus issue to allow the Plaintiffs to open as a book store, that upon further hearing, an Injunction or Declaratory Judgment issue that enjoins the City of Memphis—for estoppel, failure to enforce, and abandonment of its Special Permit regulations, et cetera. The issue is the application of that principle, and is not whether or not equitable principles should ever be applied in Chancery. It is toward that end, and the Court would note that the Defendants' lawsuit in the—they are the Plaintiffs in the number 86667 case. Their lawsuit was filed on February 29th of this year. No Motions were put on our Motion Docket to be heard, and we hear them regularly, on every Friday except when the Court might be out of town for a Judicial Conference. There had been no Answer filed. There was ample opportunity for the Plaintiffs in that action, and the Defendants in one of the other two remaining cases to have sought a Default Judgment, and it chose not to do so. Therefore, the argument of "timeliness" is one that certainly goes both ways, the argument that the City waited too long in attempting to pass a new ordinance. However, the Court would also point out that the Plaintiffs in that action waited as well without taking any action. As to

the fact that this is a creation of a new right, the Court disagrees. The issue to come before this Court at this time is not "constitutionality." The Court has ruled on that. The issue is simply whether or not there was a full and adequate disclosure to the City by the other two parties in this series of actions about what they were going to do aside from "Adult Book Stores." The Court agrees with the argument that, if they had been open and above board and complete, that the City's denial on the basis that it didn't meet the then City ordinance as an "Adult Book Store", they had every right to ignore that. The Court agrees with that argument. But, in looking over the Affidavits, and attached to the Affidavits and also as a part of the Answer of one of the Defendants in the lawsuit, the letter from Mr. Allison, that aside from this—and I don't wish to cloud the issue, this "Adult Entertainment" or "Adult Book Store" aspect, aside from that, in the second paragraph, it says: "In the meantime however, my client wishes to open his business as a News Mart and amusement arcade. He has paid all the proper taxes and obtained the necessary licenses to do this." I will skip one other sentence and go to the final sentence: "The machines will be amusement machines." (indicating) When I look at the exhibits attached to both of these lawsuits, the photographs, which speak louder than any other Affidavits, on the Playmate one, it says: "Adult Visual Center - Peep Shows - Adult Video Theater." It is that "Video Theater." The word "Adult" is not significant to this Court on all of these issues. As to the other, twenty-five cent movies, compared to a local theater, I'm sure they're short movies, but "movies." The word "Adult" is not of significance. What concerned the Court and still concerns the Court is that that representation of having movie theaters, a video theater, movies, that lack of representation to the City is, I believe, mate-

rial, and the City, in the case of Watkins News Mart receives a letter that sets out specifically what it is that the news mart is going to do. The news mart can indeed go ahead and do the adult books if they want to, since I have held that to be unconstitutional. They could have back then, but they didn't say "We're going to have movies. We're going to have a movie theater." The Court finds that that is something that the City has a right to know. The question is, does this make any difference or not? And, this Court doesn't know at this point if it is going to make a difference, because the City didn't have the benefit of being told that, so they could go out there and view the premises with that standard in mind, for movie theaters, treating this business no better and no worse than any other business. The question is: "All right. Is that a material misrepresentation?" The Court finds toward that end that it would be a burden on the City to show that, taken back to the time when all of this started, that if they had been told, aside from the "Adult Book Store" concept, "Adult" aside, if they had been told that these places were going to be operating movie theaters, video theaters, would they still have had to have issued the Use and Occupancy Certificate? Would it have met all of their criteria? The Court agrees with the Defendants' argument that at this point, the Court can not say that it would or would not. Therefore, I will allow additional proof to be taken with that standard in mind. The City will have to carry that burden of proof, subject to a rigorous cross-examination and rigorous discovery by the Defendants and otherwise, to find out whether or not that would have made a difference. If it would have made a difference, then it is indeed a material misrepresentation that the City relied, to its legal detriment, on and they are indeed entitled to have that action, the

issue of the Use and Occupancy Certificate rescinded, and whatever has transpired since then, it is now of no concern to the City in terms of the legislative action by the Council. The Court would find itself in the position of having to put the parties, as of the date of the entering of that Final Decree, back into the same position that they were in before all of this had transpired, but under current and existing laws. If the City fails to carry that burden of proof, if indeed the proof is that, aside from the Adult Theater or Adult Book Store rather, a video theater or a movie theater, they would still have had to issue a Use and Occupancy Certificate, then, indeed, the Defendants are correct, that since the Court did find that the ordinance was unconstitutional, and if at that point, the Court did not find that there was a material representation upon which the City relied to its legal detriment, then, indeed, then the Defendants would be in a position to be entitled to a Use and Occupancy Certificate under those laws at that time, with an unconstitutional law, and no other ordinance having been passed.

* * *

APPENDIX G

IN THE
CHANCERY COURT OF SHELBY COUNTY,
TENNESSEE

NO. 86667-3

STATE OF TENNESSEE, ON THE RELATION OF
COWETTA NEWS, INC., D/B/A PLAYMATE
VISUAL CENTER
PLAINTIFFS

vs.

CITY OF MEMPHIS

NO. 86944-3

CITY OF MEMPHIS
PLAINTIFF

vs.

COWETTA NEWS, INC., D/B/A PLAYMATE
VISUAL CENTER
DEFENDANT

NO. 86945-1 (3)

CITY OF MEMPHIS
PLAINTIFF

vs.

WATKINS NEWS MART AND MIKE RAY
DEFENDANTS

HEARING DATE: September 11, 1980

FINDINGS OF THE COURT

THE COURT: Thank you, gentlemen. I think all of you for the efficiency with which you have swiftly

brought the matter before this Court for a final determination. The Court in its first opinion prematurely had found that there was a material misrepresentation. The Court did not prematurely find that there was a misrepresentation, and the entire purpose, as I at length went into in the second opinion, for the necessity of further proof and for this hearing was to determine whether or not there was a material misrepresentation.

The legal principles that are involved here are significant. This Court is not familiar with any case in any jurisdiction that says that a citizen, a private citizen, in their private citizen capacity, has to tell the truth. They can lie, they can do whatever they want, but they do so at some peril if that lie creates a material misrepresentation on which there is a detrimental reliance which leads a person or persons or group to do that which otherwise they would not have done.

The Court believes that the purpose behind that is that it recognizes as a matter of public policy that part of the freedom of speech in this country is the recognition that people sometimes puff, they exaggerate, they tell falsehoods, and they shouldn't be afraid, to guard their language so closely with regard to those things which are almost second nature to human beings, but are held accountable when they go over the line, and that line being when someone else is harmed by it, and even if that harm is a minimal harm, but there is an actual harm.

That becomes significant in this case because the Court does believe that indeed, there was a misrepresentation by the companies that made application to the City, but that in and of itself is not enough. Government is held to a higher standard when it comes to misrepresentation than the average citizen. As an example, under

the Constitution, analogously dealing with "search and seizure", it is well settled that that is a right that is imposed upon government, it is not one that serves as a restraint upon an individual.

Therefore, evidence which might otherwise be suppressed as an illegal search and seizure if conducted by a government or a government agent, if achieved even in the same unlawful manner by an individual, would still be admissible. That individual, of course, would be subject to possible civil prosecution by the aggrieved party. That is significant to this Court because I fully understand the City's position. What the City is simply saying is "We have to be honest with everybody, and we expect them to be honest with us." But, unfortunately, the Court believes that the City works, as it does in so many other areas, as government in general does, because it is, of course, the servant of the community in general, is at a little bit of a disadvantage, because when they tell a falsehood, even if it is not material, they really catch it, but if the citizen does the same to the City or any other governmental agency or any individual, unless that falsehood causes an actual harm, a harm being, for example, a detrimental reliance or a change of position by the person relying on the misrepresentation, that, absent that, there is no accountability.

The equitable maxim that was quoted, the Court has reflected on many times, and the last portion of it is: "Mislead another to its injury." Again, the same, consistent principle. There has to be an "injury." Just to mislead is not enough. Based on the deposition, it is very clear to this Court that the City's Officer in Charge of issuing these permits would have done nothing different had he been told the truth, that there was nothing in the ordinances that would have required him to do any-

thing differently. There was nothing that would have required something different from the companies.

Therefore, the Court does not find that there was a material misrepresentation, because the Court doesn't find that there was any detrimental reliance, and does not find that the City relied on these misleading misrepresentations to its injury. The question finally boils down to "So what? What would the City have done differently?" The answer that I glean from that deposition is "Nothing." They just don't like being lied to, and nobody does.

The Court would point out that, while this may be a disadvantage from a pleasantry point of view of the course of conduct of the City with other persons, it is not a shackle on the City in the case of a person who makes a material misrepresentation, but that is a burden that is on the City. If, for example, the true owner of this place, by law would be estopped from running such an establishment, as we have in the case of liquor establishments, you can't operate one if you are a convicted felon, then, that would be a material misrepresentation, but there is nothing here in this record that shows that there was any material misrepresentation.

Therefore, the Court abhors persons who tell falsehoods, as a matter of law, and even as a matter of equity, the Court finds no basis upon which the relief sought by the City can be granted, and therefore, a Final Decree should be entered in favor of these companies. Gentlemen, do you have any questions?

* * *

APPENDIX H

IN THE
CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY
DIVISION AT MEMPHIS

NO. 86667-3

STATE OF TENNESSEE on the Relation of COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Plaintiff,

vs.

CITY OF MEMPHIS,
Defendant.

NO. 96944-3

CITY OF MEMPHIS,
Plaintiff,

vs.

COWETTA NEWS, INC., d/b/a PLAYMATE VISUAL CENTER,
Defendant.

NO. 86945-1[3]

CITY OF MEMPHIS,
Plaintiff,

vs.

WATKINS NEWS MART and MIKE RAY,
Defendants.

AMENDED FINAL DECREE

These causes came on to be heard on July 2, 1980, upon the Motion of Cowetta News, Inc. to Alter or Amend

Judgment and to Stay the Effect of Injunction until Final Determination of Motion to Alter or Amend Judgment, upon argument by solicitors for the parties and upon the entire record in the causes;

From all of which it appeared to the Court as set forth in the opinion rendered on July 2, 1980, and filed herein on September 11, 1980, said opinion incorporated herein by reference as if fully set forth, that although there were misrepresentations made to the City by Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray, the City would have to carry the burden of proof that the misrepresentations were material representations upon which the City relied to its legal detriment and the Court granted the City additional time to provide additional proof concerning the aforesaid issue;

That subsequent to the opinion rendered on July 2, 1980, additional proof was submitted by the parties hereto and the cause came on to be heard on September 11, 1980, at which time the Court ruled in favor of Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray for the reasons set forth in the opinion of September 11, 1980, filed September 30, 1980, said opinion incorporated herein by reference as if fully set forth;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Final Decree heretofore entered be and is hereby amended for the reasons set out in the opinions incorporated herein by reference, to reflect that Cowetta News, Inc., d/b/a Playmate Visual Center and Watkins News Mart and Mike Ray may continue to use their premises under the Use and Occupancy Certificate heretofore issued by the City.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that costs of the causes are to be divided equally among the parties.

The exception by the City of Memphis to the Court's action is noted and the City is hereby granted an appeal to the Court of Appeals as provided by law.

/s/ D. J. Alissandratos
Chancellor
Dated: 10-1-80

APPROVED FOR ENTRY:

E. Brady Bartusch
Solicitor for Plaintiff,
City of Memphis

James T. Allison
Solicitor for Defendants,
Watkins News Mart and
Mike Ray

Stephen D. Wakefield and
Michael F. Pleasants
Solicitors for Defendant,
Cowetta News, Inc., d/b/a
Playmate Visual Center

APPENDIX I

IN THE
CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY
DIVISION AT MEMPHIS

NO. 86944-3

CITY OF MEMPHIS,
Plaintiff,

vs.

COWETTA NEWS, INC., d/b/a PLAYMATE
VISUAL CENTER,
Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

TO: THE CHANCELLORS OF THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

Comes now the Plaintiff, City of Memphis, and for its cause of action would respectfully show the Court that:

1. Plaintiff is a municipal corporation under the laws of the State of Tennessee and located in Shelby County and that the Defendant is a Tennessee Corporation with offices in Shelby County, Tennessee, doing business as Playmate Visual Center at 1764 Winchester, Memphis, Tennessee.

2. The City of Memphis on March 25, 1980, issued a Certificate of Use and Occupancy to the Defendant for the premises at 1764 Winchester, Memphis, Tennessee, to be used as Cowetta News Agency; that included within the special stipulations and conditions of the aforesaid Certificate of Use and Occupancy was the provision that adult entertainment as defined in Section 28-77 of the

Memphis and Shelby County Zoning Ordinance was not a permitted use at this location, said Certificate of Use and Occupancy attached hereto as Exhibit 1 of this Complaint for Injunctive Relief. That there was in full force and effect at the time of the issuance of the Certificate of Use and Occupancy Section 28-77 of the Code of Ordinances of the City of Memphis which contains the following definition:

> Adult Entertainment:
>
> A shop or theatre for the barter, rental, or sale of printed matter, pictures, motion picture film, or the viewing of motion pictures that is open to adults only and specifically excludes any minor by reason of age; and provided further that no building or occupancy permit shall be issued for such use until and unless the location of such use shall have been approved by the City Council after receiving a report by the Planning Commission in accordance with the procedure set forth in Section 28-102.

Section 28-102(A) and (B) of the Code of Ordinances of the City of Memphis contains the following provisions:

> (A) The board of commissioners may, by special permit and subject to such protective restrictions that are deemed necessary, authorize the construction, location, extension or structural alteration of any of the following buildings or uses, or an increase in their height, in any district from which these are prohibited or limited by this article . . . (buildings or uses enumerated 1-20)
>
> (B) Before issuance of any special permit for any of the above buildings or uses, the following conditions shall be complied with:

(1) A public hearing in relation thereto shall be held before the planning commission, notice and publication of which hearing shall conform to the procedure prescribed in section 28-111 for hearings on changes and amendments.

(2) The planning commission shall study and report its recommendations to the board of commissioners regarding the effect of such proposed building or use upon the character of the neighborhood and upon traffic conditions, public utility facilities, and other matters pertaining to the public safety or general welfare. No action shall be taken upon any application for a proposed building or use above referred to until and unless the report and recommendations of the planning commission have been filed and reviewed by the board of commissioners, but such report shall be made within thirty (30) days after the date of the public hearing.

(3) A special use permit shall expire one (1) year from the date of its approval by the city council unless the application acquires a certificate of use and occupancy or a building permit within said time, provided that no such certificate of use and occupancy shall be granted until all conditions imposed by the city council have been met. Application for renewal or amendment of the original application or an amendment of an existing special permit shall be made pursuant to the procedures required for an original application.

At the time of the issuance of the Use and Occupancy Certificate Section 28-102(A), Subsection 20 of the Code of Ordinances of the City of Memphis, was as follows:

"Adult entertainment, shops and theatres may be authorized in the C-2, C-3, or C-4 Commercial Districts or in any industrial district subject to the following conditions:

(a) The building in which an adult shop or theatre is located shall be a minimum of two hundred (200) feet from any residential zoning district.

(b) A schedule stating the days and hours of operation shall be submitted for review and approval.

(c) Parking space shall be provided on the same premise as the shop or theatre on the ratio of not less than one (1) parking space for each one hundred (100) square feet of floor space within the main building, except for premises located within the "C-4" Central Business District."

As indicated, the aforesaid Code provision requires a public hearing before the Planning Commission and City Council before the issuance of a special use permit, said ordinance attached hereto as Exhibit 2.

3. That subsequent to the issuance of the building permit to Cowetta News Agency but prior to the issuance of the aforesaid Certificate of Use and Occupancy, the City of Memphis through inspections made by its Building Department ascertained that the building was going to be utilized as an establishment for adult entertainment and for that reason refused to issue the Defendant a Certificate of Use and Occupancy without its obtaining a special use permit for adult entertainment.

4. That as a result of the City's refusal to issue a Certificate of Use and Occupancy as above set forth, the Defendant on February 29, 1980, in this Court filed a Complaint for Mandamus Injunction and Declaratory Judgment

in the case styled *State of Tennessee On The Relation of Cowetta News, Inc., d/b/a Playmate Visual Center, Plaintiff v. City of Memphis, Defendant, No. 86667-3,* wherein the Complaint sought a Writ of Mandamus requiring the City of Memphis to issue it a Use and Occupancy Certificate for its business as a bookstore and additionally sought a declaration of the Court that Sections 28-77 and 28-102 of the Code of Ordinances of the City of Memphis, were unconstitutional. In the sworn Complaint, the Defendant herein alleged that it had advised the Building Inspector of the City of Memphis that the Defendant herein intended to open as a regular bookstore and pursuant to this desire had made arrangements to open as a regular bookstore but that the Defendant herein was illegally denied by the City Memphis the right to open its business as a regular bookstore.

5. The City of Memphis, relying on the representations made by the Defendant, issued the aforesaid Certificate of Use and Occupancy on March 25, 1980, for the premises to be used as Cowetta News Agency with the specific stipulation and condition that the premises was not to be used for adult entertainment as defined in Section 28-77.

6. That since the issuance of the Certificate of Use and Occupancy for the Cowetta News Agency, the Defendant has in fact operated the premises for adult entertainment as defined in Section 28-77 of the Code of Ordinances of the City of Memphis without obtaining the required special use permit. That filed with this Complaint for Injunctive Relief and in support thereof is an Affidavit of Walter Nesbit, Policy Coordinator of the Division of Public Service of the City of Memphis, reflecting that on April 25, 1980, he purchased at the Defendant's store at

1764 Winchester five (5) magazines with the following titles and descriptions thereon:

(1) *Climax I* - Adults Only

(2) *Unreleased Dynamic Films* - Adults Only - Not for Sale to Minors

(3) *Con Amore* - A Pornographic Magazine

(4) *Pagan Male* - Homosexuals in Action

(5) *Flesh* - Not for Sale to Minors

That in addition to the aforesaid, movies were available for a specified price which depicted specific sexual activity between individuals and specific anatomical areas of individuals. That also available for sale and on display on the counter were various sexual devices and stimulants.

7. That since the issuance of the Certificate of Use and Occupancy on March 25, 1980, Section 28-77 and 28-102 (A) (20), of the Code of Ordinances of the City of Memphis were amended on final reading on April 29, 1980, said amendment attached hereto as Exhibit 3. The amended ordinance more specifically defines adult entertainment and continues to require a special use permit said amendment containing the following language:

"ADULT ENTERTAINMENT:

Adult entertainment means and includes any and all of the following:

(a) Adult Book Store: An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Speci-

fied Anatomical Areas", as these terms are later defined in this Section, or an establishment with a segment or section devoted to the sale or display of such material.

(b) Adult Motion Picture Theater: An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", as these terms are later defined in this Section, for observation by patrons therein.

(c) Adult Mini Motion Picture Theater: An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", as these terms are later defined in this Section, for observation by patrons therein.

(d) Live Performance: An establishment where "Specified Sexual Activities" or "Specified Anatomical Areas", as these terms are later defined in this Section, are performed live or displayed for actual observation by patron therein.

SPECIFIED ANATOMICAL AREAS:

(a) Less than completely and opaquely covered: (1) human genitals, pubic region, (2) buttock, and (3) female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or the erotic touching of human genitals pubic region, buttock or female breast;

(d) Acts of beastiality."

SECTION 28-102.(A)(20):

Adult entertainment may be authorizd in the C-2, C-3, and C-4 Commercial Districts or any industrial district subject to the following minimum standards to avoid deleterious effects upon adjacent areas, including blighting and downgrading of property values:

(a) The hours and days of operation of such adult entertainment shall be submitted for the review and approval of the legislative body.

(b) The building or structure in which such adult entertainment is located shall be located at least 200 feet from any land located in the residential zoning district or the residential portion of an approved planned unit development.

(c) Parking space shall be provided on the same premises as the shop or theatre on the ratio of not less than one (1) parking space for each one hundred (100) square feet of floor space within the main building, except for premises located within the "C-4" Central Business District.

That the Defendant has likewise violated the aforesaid Ordinance as it is utilizing its premises for adult entertainment as defined therein and has not obtained a special use permit as required in Section 28-102. That the Affidavit of

Walter Nesbit reflects the purchase at the Cowetta News Agency, Inc., d/b/a Playmate Visual Center on May 5, 1980, a magazine with the following title and description thereon:

Water and Power - For Entertainment of Adults Only - Sale to Minors Forbidden

That said magazine reflects specified anatomical areas and specified sexual activities of persons as defined in the ordinance and the Affidavit reflects that a substantial portion of defendant's stock in trade, books, magazines and other periodicals emphasize matter depicting, describing or relating to specified anatomical areas and specified sexual activities. Additionally, the Affidavit reflects that movies were available which presented material distinguished or characterized by an emphasis on matter depicting specified sexual activities and specified anatomical areas as defined in the ordinance.

8. That the Defendant by its action in utilizing its premises for adult entertainment is in violation of the aforesaid ordinances concerning adult entertainment and special use permits (Sections 28-77 and 28-102) as well as Section 28-106 of the Code of Ordinances of the City of Memphis which limits the use of property to that which is described in the Certificate of Use and Occupancy, said Section hereto attached as Exhibit 4, and that the City of Memphis will sustain irreparable injury if it fails to enforce its ordinances and require the Defendant to comply with its laws.

PREMISES CONSIDERED, COMPLAINANT PRAYS THAT:

1. Defendant be required to answer this Complaint within the time required by law.

2. Upon the filing of this Complaint and notice to the Defendant a Temporary Injunction issue restraining the Defendant, its agents, servants and employees from violating the Certificate of Use and Occupancy heretofore issued and from utilizing its premises at 1764 Winchester, Memphis, Tennessee, for adult entertainment as defined in Section 28-77 of the Code of Ordinances of the City of Memphis without obtaining a special use permit as required by Section 28-102 of the Code of Ordinances of the City of Memphis.

3. At the final hearing in this matter, a permanent injunction issue against the Defendant restraining it, its servants, its agents and employees from violating the Certificate of Use and Occupancy heretofore issue and from utilizing its premises at 1764 Winchester, Memphis, Tennessee, for adult entertainment as defined in Section 28-77 of the Code of Ordinances of the City of Memphis without obtaining a special use permit as required by Section 28-102 of the Code of Ordinances of the City of Memphis.

4. Plaintiff have such other further and additional relief as it may be entitled to under the pleadings and the facts.

THIS IS THE FIRST APPLICATION FOR AN INJUNCTION IN THIS CAUSE.

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/s/ E. Brady Bartusch
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